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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

THE SOUTHLAND CORPORATION, *et al.*,

Appellants,

—v.—

RICHARD D. KEATING, *et al.*,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

APPENDIX TO JURISDICTIONAL STATEMENT

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September 1982

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APPENDIX A

IN THE SUPREME COURT OF
THE STATE OF CALIFORNIA

S.F. 24242

(Superior Court No. 469216-2)

RICHARD D. KEATING et al.,

Petitioners,

—v.—

THE SUPERIOR COURT OF ALAMEDA COUNTY,

Respondent;

SOUTHLAND CORPORATION et al.,

Real Parties in Interest.

EDWARD J. GOUVEIA et al.,

Plaintiffs and Respondents,

—v.—

SOUTHLAND CORPORATION et al.,

Defendants and Appellants.

[And 7 other cases.]*

Filed June 10, 1982

SEE CONCURRING AND DISSENTING OPINION

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* Cheng v. Southland Corporation (Super. Ct. No. 505162-3); Newell v. Southland Corporation (Super. Ct. No. 505164-1); Sampson v. Southland Corporation (Super. Ct. No. 505161-4); Battersby v. Southland Corporation

These coordinated cases arise out of disputes between Southland Corporation (Southland), owner and franchisor of 7-Eleven convenience food store operations throughout the country, and persons who are, or were, franchised operators of 7-Eleven stores in California. The issues before us do not concern the merits of those disputes, but rather the forum and procedure for their resolution. Southland contends that the disputes should be submitted to arbitration on an individual (i.e., franchisee-by-franchisee) basis, pursuant to an arbitration provision contained in its agreement with each franchisee. The franchisees, who have sued Southland[1] in both individual and class actions on a variety of grounds, and who are all represented by the same law firm, contend alternatively that the arbitration provisions are not enforceable on adhesion grounds; that insofar as the disputes involve alleged violation by Southland of the Franchise Investment Law they are not subject to arbitration; and that Southland has waived its right to insist upon arbitration in certain of the cases. Franchisees also contend that if there is to be arbitration it should proceed on a classwide, rather than individual, basis. We will hold that the adhesive nature of the franchise contract is not itself a bar to enforcement of the arbitration provision, but that the trial court properly excluded claims based upon alleged violation of the Franchise Investment Law. We will affirm the trial court's holding that there has been no waiver by Southland of its right to insist upon arbitration; but we will remand to the trial court for determination as to whether the interests of justice require that the order to arbitrate be conditioned upon Southland's acceptance of classwide arbitration.

We first describe the factual and procedural background relevant to analysis. Under the terms of Southland's standard

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(Super. Ct. No. 390132); Keating v. Southland Corporation (Super. Ct. No. 505159-9); Coy v. Southland Corporation (Super. Ct. No. 506120-6); and Scovis v. Southland Corporation (Super. Ct. No. C-235779).

1 The suits also named certain corporate officers as defendants, but as the parties do not distinguish them with respect to the issues presented here, we shall use the term Southland to include both the corporation and its officers.

7-Eleven franchise agreement (hereafter the agreement(s)), Southland provides each franchisee with a license to use certain nationally known and federally registered trademarks, a lease or sublease of certain convenience food stores owned or leased by Southland, the financing of store inventories, and advertising and merchandising assistance. The franchisees, in turn, operate the stores, supply Southland with certain bookkeeping data, make bank deposits of receipts from the operation of the stores, and pay Southland a fixed percentage of gross profits. Each of the agreements contains an arbitration clause providing, essentially, that "[a]ny controversy or claim arising out of or relating to this Agreement or the breach thereof shall be settled by arbitration in accordance with the Rules of the American Arbitration Association . . . and judgment upon any award rendered by the arbitrator may be entered in any court having jurisdiction thereof."

Between September 1975 and January 1977, franchisees Gouveia, Sampson, Cheng and Newell (and one other franchisee whose claim has since been settled) filed individual actions against Southland alleging, among other things, fraud, oral misrepresentation, breach of contract, breach of fiduciary duty, and violation of the disclosure requirements of the Franchise Investment Law (Corp. Code, § 31000 et seq.). In each of these actions except *Gouveia,* Southland filed an answer in which the failure to arbitrate was an affirmative defense, but it took no further steps based on that defense at the time, nor did it actively seek arbitration until after the *Keating* action was filed. In *Gouveia, Newell* and *Sampson* it filed cross-complaints, and participated in discovery, including taking the depositions of each of the named plaintiffs.

In May 1977 franchisee Keating filed a class action on behalf of an asserted class composed of approximately 800 Southland franchisees in California, alleging claims substantially similar to those being claimed by the other franchisees, and alleging also that Southland's accounting procedures were unfair and inaccurate. Southland promptly removed *Keating* to the federal district court, and filed an answer and counterclaim to the complaint. A few days later, it filed an amended answer

asserting arbitration as a defense. When *Keating* was remanded to the state courts, at franchisees' request, Southland petitioned to compel arbitration in all of the pending cases, but ruling on that petition was stayed pending determination of a motion by the franchisees for coordination of the actions. By this time, the list of actions included a class action filed by franchisee Battersby, and the parties stipulated that *Battersby* would be governed by the rulings in *Keating*.

In November 1977, the motion to coordinate the various actions was granted by the Judicial Council, on condition that franchisees file substantially amended complaints which would demonstrate the asserted similarities among the actions. The amended complaints contain substantially comparable allegations including claims of misrepresentations in connection with the sale of the franchises and inaccurate information about fees, discounts, and the overall performance of 7-Eleven stores.

Except for the claims based on the Franchise Investment Law, the trial court granted Southland's motions to compel arbitration in each of the coordinated actions, without passing upon the franchisees' request for class certification. Southland then appealed from the order to arbitrate insofar as it excluded claims based on the Franchise Investment Law, and the franchisees filed a petition for writ of mandate or prohibition seeking relief from the order to arbitrate on the various grounds stated above. We proceed to consider the issues presented in the order most convenient for discussion. Initially, we observe that since the franchise agreements were between a Texas corporation and California residents, entailed the right to use federally registered trademarks, and contemplated a continuing business relationship between the parties across state lines, they involve interstate commerce and fall within the ambit of the Federal Arbitration Act. (9 U.S.C. § 2.)[2] We shall,

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2 Section 2 provides: "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an

therefore, take that statute into account in passing upon the issues presented.

I. ADHESION.

In his declaration in opposition to Southland's petition to compel arbitration, Keating stated the franchise agreement was presented to him by Southland representatives on a take-it-or-leave-it basis, with no opportunity to bargain or to negotiate; and that other than the information set forth in the franchise agreement itself, and a pamphlet of the American Arbitration Association describing their procedures, he was "given no verbal or written explanation of the meaning of arbitration, the concept of an arbitration proceeding, the fact that it involved [his] waiver of [his] constitutional rights to a jury trial, a loss of the right to utilize the protection of the courts in the discovery process, nor any information with respect to what arbitration would cost in a procedure of this type." He, and the other franchisees who, in effect, adopt his declaration, contend that the declaration raised questions of fact concerning the enforceability of the arbitration clauses which should have been resolved before arbitration was ordered. The trial court ordered arbitration notwithstanding these contentions. On this score, we find no error.

We accept franchisees' characterization of the franchise agreements, and hence the arbitration agreements, as contracts of adhesion, " . . . 'a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it.' " (Graham v. Scissor-Tail, Inc. (1981) 28 Cal.3d 807, 817, quoting from Justice Tobriner's decision in Neal v. State Farm Ins. Cos. (1961) 188 Cal.App.2d 690, 694.) It is undisputed that the franchise agreements in question here are standardized in form, at least as regards the

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agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

arbitration provision; and that they are drafted and imposed by defendant, a large corporation of vastly superior bargaining strength, upon all parties desiring a 7-Eleven franchise. The California Legislature has determined that franchisees are in need of special protection in dealing with franchisors. (Corp. Code, § 31001, see generally Corp. Code, § 31000 et seq.)[3] While the franchisees were financially interested in establishing a beneficial business relationship with Southland, and while that interest may not constitute a "needed service" in the sense envisaged in *Madden* v. *Kaiser Foundation Hospitals* (1976) 17 Cal.3d 699, 711, or a "service of great importance to the public" as contemplated in *Tunkl* v. *Regents of University of California* (1963) 60 Cal.2d 92, 99, it is now clear that those factors are not prerequisite to a finding of adhesion. (Graham v. Scissor-Tail, Inc., supra, 28 Cal.3d at pp. 818, 820, fn. 18.)

It does not follow, however, that the contracts are unenforceable. "To describe a contract as adhesive in character is not to indicate its legal effect. It is, rather, 'the beginning and not the end of the analysis insofar as enforceability of its terms is concerned.' [Citation.]" (Graham v. Scissor-Tail, Inc., supra, 28 Cal.3d at p. 819.) "Thus, a contract of adhesion is fully

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3 Corporations Code section 31001 provides, "The Legislature hereby finds and declares that the widespread sale of franchises is a relatively new form of business which has created numerous problems both from an investment and a business point of view . . . . [¶] It is the intent of this law to provide each prospective franchisee with the information necessary to make an intelligent decision regarding franchises being offered. Further, it is the intent of this law . . . to protect the franchisor by providing a better understanding of the relationship between the franchisor and franchisee with regard to their business relationship." (See Damon, *Franchise Investment Law* (1971) 2 Pacific L.J. 27, 27-30, 35-36.) The need for such "special protection" has been recognized in other states and by the federal government who have enacted similar legislation. (15 U.S.C. § 45(a)(1) (1964); Fla. Stat. Ann., § 817.416 (1971) and Rules Chap. 2-17 (1974); Hawaii Rev. Stat., § 482 E-1 (1974); Ill. Rev. Stat., ch. 121-1/2, § 702 (1974); Ind. Code, § 23-2-2.5-47 (1975); Mich. Stat. Ann., § 19.854(1) (1974); Minn. Stat., § 800.01 (1973); Ore. Rev. Stat., § 650.007, rule 40-050 (1975); R.I. Gen. Laws, § 19-28-2 (1973); Va. Code, § 13.1-558 (1972); Wash. Rev. Code, § 19.100.010 (1972); and Wis. Stat., § 553.01 (1972) Admin. Code, § 31.01.)

enforceable according to its terms [citations] unless certain other factors are present which, under established legal rules—legislative or judicial—operate to render it otherwise." (Id., at pp. 819-820.) "Generally speaking, there are two judicially imposed limitations on the enforcement of adhesion contracts or provisions thereof. The first is that such a contract or provision which does not fall within the reasonable expectations of the weaker or 'adhering' party will not be enforced against him. [Citations.] The second—a principle of equity applicable to all contracts generally—is that a contract or provision, even if consistent with the reasonable expectations of the parties, will be denied enforcement if, considered in its context, it is unduly oppressive or 'unconscionable.' " (Id., at p. 820.)

Arbitration in the setting of a contract of adhesion does pose special problems, both because arbitration necessarily entails relinquishment of the constitutional right to trial by jury and because it is susceptible of being structured, or utilized, in such a way as to gain unfair advantage to the party with superior bargaining power. *Graham* v. *Scissor-Tail, Inc.*, supra, 28 Cal.3d 807, in which the agreement called for arbitration by a presumptively partial tribunal, provides an example of that sort of unfairness (see also, Hope v. Superior Court (1981) 122 Cal.App.3d 147). As we shall discuss later in this opinion, reliance upon individual arbitration agreements to insulate the stronger party from otherwise appropriate class actions may also be inequitable depending upon the circumstances.

In the absence of some special element of unfair advantage, however, arbitration is generally considered to be a mutually advantageous process, providing for resolution of disputes in a presumptively less costly, more expeditious, and more private manner by an impartial person or persons typically selected by the parties themselves. (See Madden v. Kaiser Foundation Hospitals, supra, 17 Cal.3d 699.) For these reasons, the fact that provision for arbitration is contained in a contract of adhesion will not, of itself, render the provision unenforceable. (Graham v. Scissor-Tail, Inc., supra, 28 Cal.3d at pp. 819-820.)

Moreover, provision for arbitration in a commercial context is quite common, and reasonably to be anticipated. Indeed, Keating's declaration itself makes clear that he was aware of the provision, and of the American Arbitration Association pamphlet making reference to the applicable rules. In such a setting neither he nor the other franchisees are in a position to claim that the arbitration provision itself, or the fact that it would entail waiver of jury trial, lack of formal discovery, or certain costs, did not "fall within [their] reasonable expectations." (Graham v. Scissor-Tail, Inc., supra, 28 Cal.3d at p. 820.)

For these reasons, we conclude that the arbitration provisions of the franchise agreement were, in general, binding and enforceable. We proceed now to consider the remaining issues.

II. Arbitrability of Franchise Investment Law Claims.

We next consider Southland's appeal from the trial court's denial of its petitions to compel arbitration concerning certain claims made against it pursuant to the Franchise Investment Law (Corp. Code, § 31000 et seq.). These claims assert, among other things, that Southland systematically violated section 31202[4] of the Corporations Code by willfully making untrue statements of material fact, and by willfully omitting to state material facts which are required to be stated in statements required to be disclosed under section 31101.[5] The trial court was apparently of the view that these claims were not subject to arbitration as a matter of contract interpretation and also as a consequence of Corporations Code section 31512, part of the Franchise Investment Law, which provides: "Any condition, stipulation or provision purporting to bind any person ac-

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4 Section 31202 provides: "It is unlawful for any person willfully to make any untrue statement of a material fact in any statement required to be disclosed in writing pursuant to Section 31101, or willfully to omit to state in any such statement any material fact which is required to be stated therein."

5 Section 31101, subdivision (c) listed some 15 items of information to be disclosed.

quiring any franchise to waive compliance with any provision of this law or any rule or order hereunder is void." Since we agree with the latter conclusion we find it unnecessary to consider the former.

In *Wilko* v. *Swan* (1953) 346 U.S. 427, the United States Supreme Court interpreted nearly identical language in section 14 of the Securities Act of 1933 (15 U.S.C. § 77n)[6] to permit suit by a customer against a securities brokerage firm for alleged misrepresentation in the sale of securities, notwithstanding a provision for arbitration contained in the margin agreement. The arbitration clause, the court decided, constituted a "stipulation," and the right to select the judicial forum the kind of "provision" that could not be waived in advance under section 14. (346 U.S. at pp. 434-435.) In arriving at this conclusion, the court observed that section 12(2) of the act "created a special right to recover for misrepresentation which differs substantially from the common-law action in that the seller is made to assume the burden of proving lack of scienter" (346 U.S. at p. 431), and that this "special right" was enforceable in any court of competent jurisdiction, with a wide choice of venue (ibid.). The court placed primary emphasis, however, upon the proposition that the effectiveness of the statute "is lessened in arbitration as compared to judicial proceedings" (id., at p. 435), in part because of the limited nature of judicial review (id., at p. 436). "As the protective provisions of the Securities Act require the exercise of judicial direction to fairly assure their effectiveness, it seems to us that Congress must have intended [the waiver provision] to apply to waiver of judicial trial and review (id., at p. 437).[7]

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6 That language reads: "Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void."

7 In *Scherk* v. *Alberto-Culver Co.* (1974) 417 U.S. 506, the Supreme Court declined to apply the *Wilko* rule to a suit under section 10(b) of the Securities Exchange Act of 1934 and rule 10b-5 thereunder, for rescission of a purchase agreement by which Alberto-Culver Co., an American corpora-

The evidence is persuasive that in drafting the Franchise Investment Law California legislators looked to the Securities Act of 1933 as their model. Not only do the two statutes have the same purpose of protecting investors through preinvestment disclosure statements, but their parallel provisions are often expressed in identical language.[8] Corporations Code section 31301 contains substantially the same provision relating

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tion, purchased the trademarks and stock of two foreign corporations. In reaching this conclusion, the court relied primarily on the international character of the transaction, reasoning that "[a] parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate [policies of certainty and predictability], but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages." (Id., at pp. 516-517.) While the court made reference to the fact that the Securities Exchange Act did not contain the liberal venue provisions of the Securities Act, and suggested that a "colorable argument" could be made for distinguishing *Wilko* on that ground (id., at p. 513), subsequent cases have continued uniformly to apply the *Wilko* v. *Swan* rule to actions brought by customers against brokerage houses under the Securities Exchange Act, limiting *Scherk* to the arena of international securities transactions. (Merrill Lynch, Pierce, Fenner & Smith v. Moore (10th Cir. 1978) 590 F.2d 823; accord, Mansbach v. Prescott, Ball & Turben (6th Cir. 1979) 598 F.2d 1017; Weissbuch v. Merrill Lynch, Pierce, Fenner & Smith, Inc. (7th Cir. 1977) 558 F.2d 831; Sibley v. Tandy Corp. (5th Cir. 1977) 543 F.2d 540; Ayres v. Merrill Lynch, Pierce, Fenner & Smith (3d Cir. 1976) 538 F.2d 532.) The Second Circuit has suggested that the relatively equal bargaining status of the parties in *Scherk* was also a distinguishing factor. (Weissbuch v. Merrill Lynch, Pierce, Fenner & Smith Inc., supra, 558 F.2d at p. 835; see generally, Gruenbaum, *Avoiding the Protections of the Federal Securities Laws: The Anti-Waiver Provisions* (1980) 20 Santa Clara L.Rev. 49.)

8 Compare the definition of "sale" under section 2 of the Securities Act (15 U.S.C. § 77(b)(2)) with that in Corporations Code section 31018; the definition of "misrepresentations by omission" in section 17(2) of the Securities Act (15 U.S.C. § 77*l*(2)) with Corporations Code section 31201; the burden of proving due diligence of section 12 of the Securities Act (15 U.S.C. § 77k(b)(3)) with Corporations Code section 31301; the provision for injunction actions in section 20 of the Securities Act (15 U.S.C. § 77t(a)) with Corporations Code section 31400; and the liability of control persons of section 15 of the Securities Act (15 U.S.C. § 77o) with Corporations Code section 31302.

to scienter as the United States Supreme Court relied upon in *Wilko*.[9] And, as we have observed, the waiver language of the two statutes is virtually identical.

"This court has long recognized the principle of statutory construction that '[w]hen legislation has been judicially construed and a subsequent statute on the same or an analogous subject is framed in the identical language, it will ordinarily be presumed that the Legislature intended that the language as used in the later enactment would be given a like interpretation. This rule is applicable to state statutes which are patterned after the federal statutes. [Citations.]' " (Belridge Farms v. Agricultural Labor Relations Bd. (1978) 21 Cal.3d 551, 557.)

The presumption established by that principle of statutory construction is reinforced by the language and history of the recently adopted California Franchise Relations Act (Bus. & Prof. Code, § 20000 et seq.), regulating the grounds and procedure for termination and nonrenewal of franchises. That statute stemmed from hearings conducted in late 1977 by a subcommittee of the state Assembly Committee on Finance, Insurance, and Commerce, chaired by Assemblyman Bruce Young. A preliminary report prepared by that committee prior to hearings refers to the Franchise Investment Law as a "pre-purchase disclosure law patterned after the Securities Act of 1933," discusses various proposals for extending regulation of franchise relationships, and poses various rhetorical questions in that regard, among them the following: "Present law provides for the resolution of franchisee/franchisor disputes through the judicial system. Should the law be modified to provide for other means of resolution such as compulsory

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9 Section 31301 provides: "Any person who violates Section 31201 shall be liable to any person (not knowing or having cause to believe that such statement was false or misleading) who, while relying upon such statement shall have purchased a franchise, for damages, unless the defendant proves that the plaintiff knew the facts concerning the untruth or omission or that the defendant exercised reasonable care and did not know, (or if he had exercised reasonable care would not have known) of the untruth or omission."

arbitration and/or a Board of Franchising?"[10] The Franchise Relations Act as ultimately adopted by the Legislature contains both a nonwaiver provision nearly identical to Corporations Code section 31512 and the following provision authorizing limited arbitrability of disputes under that statute: "Nothing contained in this chapter shall limit the right of a franchisor and franchisee to agree before or after a dispute has arisen to binding arbitration of claims under this chapter, provided that: (a) The standards applied in such arbitration are not less than the requirements specified in this chapter; and (b) The arbitrator or arbitrators employed in such arbitration are chosen from a list of impartial arbitrators supplied by the American Arbitration Association or other impartial person." (Bus. & Prof. Code, § 20040.) The inference is strong, if not inescapable, that the Legislature understood the anti-waiver provision of the Franchise Investment Law to be subject to the *Wilko* (346 U.S. 427) interpretation, and that it intended to establish a different rule for the Franchise Relations Act.[11] While we have no evidence as to the policy reasons underlying that distinction, it may be that the Legislature considered arbitration more acceptable in the context of franchise relationships already

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10 Assembly Committee on Finance, Insurance, and Commerce, Ad Hoc Subcommittee on Franchising, An Evaluation of the Regulation of Franchising in California and Prospective Legislative Revisions—Background Notes for Interim Study, page 6.

11 This inference is supported by the following legislative history. Assemblyman Young, who was the author of the bill which became the Franchise Relations Act, sponsored an earlier bill (Assem. Bill No. 944 (1977 Reg. Sess.)) which provided for similar restrictions upon termination of franchises through addition of a new chapter (§ 31220 et seq.) to the Corporations Code. That bill contained a section providing for a similar nonwaiver provision which read as follows: "31224: (a) *Except as provided in subdivision (b) of this section*, any condition, stipulation, provision, or term of any franchise agreement waiving any rights granted under the chapter or relieving any person from liability imposed by this chapter shall be void and unenforceable." (Emphasis added.) Subdivision (b) permitted agreements for "binding arbitration of disputes" subject to the restrictions presently contained in the new law.

established, presumably on the basis of proper disclosure, or that it considered the more detailed provisions in the Franchise Investment Law for civil liability (Corp. Code, § 31300), administrative regulation (Corp. Code, § 31400) and criminal liability (Corp. Code, § 31410 et seq.), to require access to the courts and "the exercise of judicial direction to fairly assure their effectiveness." (Wilko v. Swan, supra, 346 U.S. at p. 437.)

Having determined that the California Legislature intended the nonwaiver provision of the California Franchise Act to be interpreted in accord with *Wilko* v. *Swan*,[12] we turn to Southland's contention that the statute as so construed may not constitutionally be applied to a "contract evidencing a transaction involving commerce" within the meaning of the Federal Arbitration Act (FAA). The argument is that the FAA, in mandating that a provision for arbitration in such a contract "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract" (FAA, § 2), establishes a general principle of arbitrability which preempts any state law or policy restrictive of arbitration, whatever the basis for that law or policy might be, and whether or not federal jurisdiction over the underlying controversy exists. We consider that argument overly broad.

The starting point for analysis is *Prima Paint* v. *Flood & Conklin* (1967) 388 U.S. 395, in which the Supreme Court held that in a federal court diversity action involving a contract subject to the FAA, a claim of fraud in the inducement of the contract (as distinguished from a claim of fraud in the inducement of the arbitration clause), is a question for the arbitrator, and not the court, to decide; and that this rule applies even though the law of the state in which the contract was to be performed might have a different rule.

The Supreme Court in *Prima Paint* rejected the contention that it was "constitutionally impermissible" to apply the FAA

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12 As in *Wilko*, the agreement here was to arbitrate such disputes as might arise in the future. We express no view as to the enforceability of an agreement to arbitrate a pending dispute under the Franchise Investment Law.

because the case was in the federal court solely by reason of diversity of citizenship. "[T]he question," the court said, "is not whether Congress may fashion federal substantive rules to govern questions arising in simple diversity cases . . . [but] whether Congress may prescribe how *federal* courts are to conduct themselves with respect to subject matter over which Congress plainly has power to legislate." (Id., at p. 405; emphasis added.) The opinion thus left open the question whether or under what circumstances *state* courts are constitutionally obligated to apply the substantive principles inherent in the federal statute.

Shortly after *Prima Paint* was decided, the New York Court of Appeals indicated it would apply FAA principles to a maritime transaction "even if such a result is not constitutionally mandated by the decision in *Prima Paint*," in order to discourage forum shopping between state and federal courts. (A/S J. Ludwig Mowinckels R. v. Dow Chem. Co. (1970) 307 N.Y.S.2d 660, 666.) Since then a number of courts, both federal and state, have adopted the view that while the FAA is not itself a source of federal jurisdiction, the statute contains certain principles of "substantive federal law" which must be applied, regardless of forum, where federal jurisdiction exists. (E.g., In re Mercury Const. Corp. (4th Cir. 1981) 656 F.2d 933, 938; E. C. Ernst, Inc. v. Manhattan Const. Co. of Texas (5th Cir. 1977) 551 F.2d 1026, 1040; Pathman Const. Co. v. Knox County Hospital Ass'n (1975) 326 N.E.2d 844, 851; Episcopal Housing Corp. v. Federal Ins. Co. (1977) 239 S.E.2d 647; Main v. Merrill Lynch, Pierce, Fenner & Smith, Inc. (1977) 67 Cal.App.3d 19, 24-25.)

While the federal district court in this case, by its remand, determined that federal jurisdiction over the franchisees' lawsuit did *not* exist, the likely explanation for that determination is the presence in the case of defendants whose citizenship precludes requisite diversity. Accordingly, we do not decide the preemption issue on that narrow ground (see In re Mercury Const. Corp., supra, 656 F.2d at p. 942).

Rather, we confront squarely the underlying issue of statutory interpretation: whether the principles of *"substantive*

federal law" embodied in the FAA, preclude a state from protecting its franchise investors through a system of statutory regulation including nonwaivable judicial remedies. While there is authority for an affirmative answer (Allison v. Medicab Intern., Inc. (1979) 597 P.2d 380, 383; Barron v. Tastee Freez Intern., Inc. (E.D. Wis. 1980) 482 F.Supp. 1213), we respectfully disagree.

The FAA was adopted in 1925 (43 Stat. 883), against a background of judicial hostility to arbitration generally. (See Kulukundis Shipping Co. v. Amtorg Trading Corp. (2d Cir. 1942) 126 F.2d 978, 984; Sayre, *Development of Commercial Arbitration Law* (1927) 37 Yale L.J. 595.) The apparent purpose of the statute was to remove that hostility, and so "make the benefits of arbitration generally available to the business world." (Robert Lawrence Company v. Devonshire Fabrics, Inc. (2d Cir. 1959) 271 F.2d 402, 407.) While there is nothing in the legislative history of the statute to suggest that Congress considered its application to state courts (see, Sturges and Murphy, *Some Confusing Matters Relating to Arbitration Under the United States Arbitration Act* (1952) 17 Law & Contemp. Prob. 580, passim), we assume that Congress intended to insulate interstate contracts from judicial hostility regardless of forum (see Fite & Warmath Const. Co., Inc. v. MYS Corp. (Ky. 1977) 559 S.W.2d 729), and to establish for such contracts certain uniform rules of interpretation (see Guinness-Harp Corp. v. Jos. Schlitz Brewing (2d Cir. 1980) 613 F.2d 468, 472.)

In these respects, California law is entirely in accord. Two years after the FAA was enacted, this state adopted its first modern arbitration statute (Stats. 1927, ch. 225), declaring arbitration agreements to be irrevocable and enforceable in terms identical to those used in section 2 of the federal act, and since that time California courts and its Legislature have "consistently reflected a friendly policy toward the arbitration process." (Kagel, A Study Relating to Arbitration, in Cal. Law. Revision Com. Recommendations and Study Relating to Arbitration (1960) p. G-28.) That policy was expanded and clarified in the current arbitration statute which was adopted in

1961 (Stats. 1961, ch. 461, § 2 et seq.), and it continues to be the policy of this state (e.g., Doers v. Golden Gate Bridge etc. Dist. (1979) 23 Cal.3d 180, 189).

Adoption of an affirmative policy toward enforcement of arbitration agreements has never implied, however, that all types of disputes are subject to arbitration. In New York, for example, one of the earliest states to encourage arbitration through statute, certain categories of disputes are insulated from arbitration as a matter of public policy. (See Associated Teachers, etc. v. Bd. of Ed. (1979) 33 N.Y.2d 229 [351 N.Y.S.2d 670].) Among these are disputes under state antitrust laws, on the ground that "through the use of economic power and contracts of adhesion, containing broad arbitration clauses, antitrust violators may be able to insulate their transgressions of the antitrust law from judicial scrutiny." (Aimcee Wholesale Corp. v. Tomar Products (1968) 21 N.Y.2d 621, 629 [289 N.Y.S.2d 968, 973-974].) The same is true of matters involving the liquidation of insolvent insurance companies (Knickerbocker Agency v. Holz (1958) 4 N.Y.2d 245 [173 N.Y.S.2d 602, 607-610]), or the usurious character of a purported sales agreement (Durst v. Abrash (1964) 253 N.Y.S.2d 351, 353).

Such exceptions to the general principle of arbitrability, like those expressed in California's Franchise Investment Law, do not reflect hostility toward arbitration, nor do they constitute an obstacle to the general enforcement of arbitration agreements in a manner consistent with federal law. Rather, such exceptions are narrowly confined to rights and remedies created by state regulatory statutes, and represent a determination that the public interest is best served by maintaining access to the remedies which the Legislature has provided. That Congress intended, through the FAA, to override state policies of that nature seems highly improbable.

The question in this case might be more debatable were it not for the fact that California's policy of protecting judicial remedies for this state's franchise investors was patterned after, and is consistent with, federal policy in the analogous area of

securities investment.[13] There is no suggestion that Congress has preempted the field of franchise investor regulation as it has, for example, the field of labor relations (cf. Teamsters Union v. Oliver (1959) 358 U.S. 283), or that the FAA embodies substantive principles intrinsic to a federally regulated field (cf. Textile Workers v. Lincoln Mills (1957) 353 U.S. 448). Having left states with power to enact laws in this area, it is hardly likely that Congress intended to preclude them from adopting policies which Congress itself has found to be appropriate.[14]

Preemption principles were recently summarized by the United States Supreme Court in *Merrill Lynch, Pierce, Fenner & Smith* v. *Ware* (1973) 414 U.S. 117, holding that California's statutory policy excluding wage claims from arbitration (Lab. Code, § 229) was not preempted by rules promulgated by the New York Stock Exchange pursuant to federal law: " 'The principle to be derived from our decisions is that federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.' [Citation.] [¶] In other contexts, pre-emption has been measured by whether the state statute frustrates any part of the purpose of the federal legislation. [Citations.] And . . . while prior cases on pre-emption 'are not precise guidelines,' because each case turns on the peculiarities and special features of the federal regulatory scheme in ques-

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13 We observe that California's Corporate Securities Law contains a substantially identical nonwaiver provision (Corp. Code, § 25701). Southland's argument would preclude its application to interstate transactions as well.

14 Southland observes that two federal statutes which regulate franchise relationships (Petroleum Marketing Practices Act (15 U.S.C. § 2801 et seq.) and Automobile Dealer Suits Against Manufacturers (15 U.S.C. § 1221 et seq.) do not contain provisions similar to 15 United States Code section 77n. Neither of these statutes impose analogous disclosure requirements however, nor has the issue of arbitrability of disputes under them been litigated in reported cases.

tion, it is where there is in existence a pervasive and comprehensive scheme of federal regulation that pre-emption follows in order to fulfill the federal statutory purposes. [Citations.] [¶] In the area of regulation that we are considering here, California has manifested a strong policy of protecting its wage earners from what it regards as undesirable economic pressures affecting the employment relationship. This policy prevails in the absence of interference with the federal regulatory scheme. We find no such interference . . . ." (414 U.S. at p. 139-140.)

The court in *Ware* did not consider the applicability of the FAA, and the holding in the case is consequently not controlling here, but the principles which the court announced strongly support rejection of Southland's argument. Not only has California "manifested a strong policy of protecting its [franchise investors] from what it regards as undesirable economic pressures affecting the [franchise] relationship" (ibid.), it has done so through a regulatory scheme containing remedies which it has deemed appropriate to protect against waiver, and in accordance with policies compatible with the pattern of federal regulation.

The United States Supreme Court has "repeatedly warned against the dangers of an approach to statutory construction which confines itself to the bare words of a statute, [citations], for 'literalness may strangle meaning.' [Citation]." (Lynch v. Overholser (1962) 369 U.S. 705, 710.) We accept that the FAA contains certain principles of substantive federal law which must be applied, regardless of forum, where federal jurisdiction exists; on that point we are fully in accord with our dissenting colleagues. We simply reject Southland's argument that those principles are so unyielding as to require enforcement of an agreement to arbitrate a dispute over the application of a regulatory statute which a state legislature, in conformity with analogous federal policy, has decided should be left to judicial enforcement.[15]

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15 Southland urges that exclusion of Franchise Investment Law claims from arbitration will lead to duplicative proceedings because franchisees'

III. WAIVER.

Franchisees contend that Southland waived its right to arbitration by delays in asserting it, and by pursuing legal actions which were inconsistent with it. We will separately consider waiver in connection with *Keating*, and with the individual actions.

The law in this area is rather well defined. Arbitration is strongly favored. Courts will closely scrutinize any claims of waiver (Gavlik Const. Co. v. H. F. Campbell Co. (3d Cir. 1975) 526 F.2d 777, 783; Seidman & Seidman v. Wolfson (1975) 50 Cal.App.3d 826, 835; 9 U.S.C. § 3; Code Civ. Proc., § 1281.2, subd. (a)), and " 'indulge every intendment to give effect to such proceedings.' (Pacific Inv. Co. v. Townsend (1976) 58 Cal.App.3d 1, 9.)" (Doers v. Golden Gate Bridge etc. Dist., supra, 23 Cal.3d 180, 189.) Moreover, the burden of proof is "heavy" and rests on the party seeking to establish waiver (Martin Marietta Aluminum, Inc. v. General Elec. Co. (9th Cir. 1978) 586 F.2d 143, 146; General Guar. Ins. Co. v. New Orleans General Agency, Inc. (5th Cir. 1970) 427 F.2d 924, 929, fn. 5) which "is not to be lightly inferred." (Gavlik Const. Co. v. H. F. Campbell Co., supra, 526 F.2d at p. 783; Davis v. Blue Cross of Northern California (1979) 25 Cal.3d 418, 426.)

The trial court here found no waiver. Because the question of waiver is one of fact, we have noted that the "determination of this question, if supported by substantial evidence, is binding on an appellate court. [Citation.] . . . [It is only] in cases where the record before the trial court establishes a lack of waiver as a matter of law, [that] the appellate court may reverse a finding of waiver made by the trial court." (Doers v. Golden Gate Bridge etc. Dist., supra, 23 Cal.3d at p. 185; see Reid Burton Const. v. Carpenters Dist. Council, etc. (10th Cir.

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common law claims of fraud and negligent misrepresentation involve the "same constellation of facts." Under federal law, such considerations may be taken into account in determining the order of proceedings, and even in determining whether common law claims should be decided in a judicial forum. (Sibley v. Tandy Corp., supra, 543 F.2d 540, 543, cert. den. (1977) 434 U.S. 824; Miley v. Oppenheimer & Co., Inc. (1981) 637 F.2d 318.)

1980) 614 F.2d 698, 703, cert. den. (1980) 449 U.S. 824 [adopting a "clearly erroneous" standard of review].)

We have recently acknowledged that while there is no "single test" in establishing waiver, the relevant factors include whether the party seeking arbitration (1) has "previously taken steps inconsistent with an intent to invoke arbitration," (2) "has unreasonably delayed" in seeking arbitration, (3) or has acted in "bad faith" or with "wilful misconduct." (Davis v. Blue Cross of Northern California, supra, 25 Cal.3d at pp. 425-426; see Germany v. River Terminal Railway Company (6th Cir. 1973) 477 F.2d 546, 547.) We have stressed the significance of the presence or absence of prejudice. Waiver does not occur by mere participation in litigation; there must be "judicial *litigation* of the merits of arbitrable issues" (Doers v. Golden Gate Bridge etc. Dist., supra, 23 Cal.3d at p. 188), although "waiver could occur prior to a judgment on the merits if prejudice could be demonstrated" (id., at p. 188, fn. 3). This result is fully consistent with federal cases which have held that "as an abstract exercise in logic it may appear that it is inconsistent for a party to participate in a lawsuit for breach of a contract, and later to ask the court to stay that litigation pending arbitration. Yet the law is clear that such participation, standing alone, does not constitute a waiver [citations], for there is an overriding federal policy favoring arbitration. . . . [M]ere delay in seeking a stay of the proceedings without some resultant prejudice to a party [citation], cannot carry the day." (Carcich v. Rederi A/B Nordie (2d Cir. 1968) 389 F.2d 692, 696; see Shinto Shipping Co. v. Fibrex & Shipping Co., Inc. (9th Cir. 1978) 572 F.2d 1328, 1330.)

Tested by these principles, the record fully supports the trial court's conclusion that there was no waiver in *Keating*. Southland had a legal right to petition for removal of the case to the federal district court; it did so promptly, as the statute requires (28 U.S.C. § 1446(b)); and in its amended pleading it asserted the arbitration agreement as a defense. Prior to remand, the only discovery which took place consisted of an exchange of documents to franchisees' benefit. Upon remand,

Southland moved promptly to compel arbitration.[16] We discern no impropriety on the part of Southland, or prejudice to franchisees, in these brief transactions.

In the remaining four individual actions, namely, *Gouveia*, *Sampson*, *Cheng*, and *Newell*, the trial court granted the motions to arbitrate except as to the Franchise Investment Law claims, and stayed the proceedings pending completion of arbitration. In noting the coordination of the various actions the court observed that "there are matters which would otherwise be arbitrable which are raised for the first time in the second amended complaint." It believed that referring to arbitration only some issues while retaining others might well achieve inconsistent results and would serve no useful purpose. The court also observed that in some cases, separately viewed, "there more than likely would have been found to be a waiver."

Franchisees interpret the foregoing trial court remarks as constituting a holding of waiver. They also contend that the trial court erred in misconstruing the coordination of the proceedings as requiring complete consistency of result between the individual cases. We do not agree. Extensively amended complaints have been filed in each case after the actions had been coordinated at franchisees' request. We cannot say, as a matter of law, that the court erroneously considered the coordinated posture of the cases in finding a lack of waiver of Southland's right to arbitration. Franchisees themselves asserted in their motion for coordination that "[e]ach of the actions for which coordination is sought herein is at the same relative stage of development." Furthermore, the court did not specify in which of the actions a waiver might have appeared, and franchisees' argument that the trial court found a waiver in any individual case is purely speculative.

Moreover, assuming a waiver had occurred as to the charging allegations in the original complaints, such waiver would not extend to issues newly raised. (Cf. Janmort Leas., Inc. v. Econo-Car Intern. (E.D.N.Y. 1979) 475 F.Supp. 1282, 1290.)

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16 It moved also for a change of venue, which was granted by stipulation.

In seeking coordination and amendment of their complaints, franchisees considerably expanded the scope of their pleadings, raising several new causes of action, injecting new factual elements, and refocusing the direction of their claims. We do not suggest that an amendment to a complaint will, per se, nullify a previous, effective waiver of arbitration in every case. Here, however, franchisees directed a newly concerted attack, evidenced by the filing of amended complaints and the motion to coordinate. This sufficiently changed the proceedings, when viewed in their entirety, to permit the trial court to find a lack of waiver of the right to arbitrate the closely interrelated and interdependent claims.

We are unable to accept franchisees' argument that any waiver occurred because of Southland's litigation-related activities in *Gouveia, Sampson, Cheng,* and *Newell.* As with similar arguments advanced with reference to the *Keating* complaint, Southland's delay in seeking arbitration of the other complaints, its filing of counterclaims and actions for unlawful detainer, and its participation in discovery did not require a finding of waiver. (Doers v. Golden Gate Bridge etc. Dist., supra, 23 Cal.3d at p. 188; Carcich v. Rederi A/B Nordie, supra, 389 F.2d at p. 696.) Here, Southland raised arbitration as an affirmative defense in its answers to each of the original complaints except in *Gouveia.* As previously noted, "it is the judicial *litigation* of the merits of arbitrable disputes which waives a party's right to arbitration" (Doers v. Golden Gate Bridge etc. Dist., supra, 23 Cal.3d at p. 188), and the burden is on franchisees to show that the trial court's determination was not supported by the facts. (See, e.g., Hart v. Orion Insurance Company (10th Cir. 1971) 453 F.2d 1358, 1361.)

Because of the mandatory nature of Code of Civil Procedure section 426.30 requiring that any related cause of action be alleged, no waiver arose by reason of the filing of the cross-complaints. As to the unlawful detainer causes of action, the agreements themselves specifically provide that a demand for arbitration "shall not operate to stay. . . the right of 7-Eleven to take possession of the Lease Property in accordance with the

Agreement." The contract contemplated that arbitration and litigation of the right to possession would proceed simultaneously.

Again, we find most significance in the lack of any prejudice demonstrated by franchisees in *Gouveia, Sampson, Cheng,* and *Newell.* While Southland participated in discovery in the individual actions before demanding arbitration, the trial court expressly conditioned its order to compel arbitration on Southland's agreement either to abstain from the use of further discovery or to extend equally extensive discovery to franchisees. Moreover, the discovery was reciprocal; for example, franchisees' petition for coordination indicated that evidence of Southland's bookkeeping practices had already been obtained and was relevant to all of the individual actions.

Neither side had completed its discovery, and Southland asserted, without refutation, that the filing of the new complaints significantly raised new issues requiring further discovery should the cases go to trial. The condition imposed by the trial court on its order for arbitration, however, prevented Southland from taking advantage of any previously discovered information.

Our function is to determine whether the trial court's finding of no waiver is supported by substantial evidence. Franchisees have not made specific claims of prejudice. Nor have we been supplied with any record of the discovery proceedings already undertaken by which we could independently assess such claims if made.

Accordingly, we cannot conclude that the trial court erred in finding no waiver and in ordering arbitration.

IV. Class Arbitration.

The trial court, in ordering arbitration, did not expressly rule upon the motions in *Keating* and *Battersby* for class certification. Franchisees contend that if arbitration is to proceed the trial court should be instructed to determine the preliminary issues regarding class certification so that it may proceed on a classwide basis. This contention requires us to

examine the special problems of unfair advantage which may appear in an adhesion setting when individual arbitration agreements are invoked to block an otherwise appropriate class action.[17]

This court has repeatedly emphasized the importance of the class action device for vindicating rights asserted by large groups of persons. We have observed that the class suit "both eliminates the possibility of repetitious litigation and provides small claimants with a method of obtaining redress for claims which would otherwise be too small to warrant individual litigation. [Citation.]" (Richmond v. Dart Industries, Inc. (1981) 29 Cal.3d 462, 469.) Denial of a class action in cases where it is appropriate may have the effect of allowing an unscrupulous wrongdoer to "retain[] the benefits of its wrongful conduct." (Vasquez v. Superior Court (1971) 4 Cal.3d 800, 808.)[18] And, as we noted in *LaSala* v. *American Sav. & Loan Assn.* (1971) 5 Cal.3d 864, 877: "Controversies involving widely used contracts of adhesion present ideal cases for class adjudication; the contracts are uniform, the same principles of interpretation apply to each contract, and all members of the class will share a common interest in the interpretation of an agreement to which each is a party."

If the right to a classwide proceeding could be automatically eliminated in relationships governed by adhesion contracts through the inclusion of a provision for arbitration, the potential for undercutting these class action principles, and for chilling the effective protection of interests common to a

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17 We assume, for purposes of this analysis, that *Keating* and *Battersby* would be maintainable as class actions under established principles, but we intimate no opinion as to whether that is, in fact, the case. That will be an issue for the trial court upon remand.

18 Federal law is in accord. (See, e.g., Weeks v. Bareco Oil Co. (7th Cir. 1941) 125 F.2d 84, 90 ("To permit the defendants to contest liability with each claimant in a single, separate suit, would, in many cases give defendants an advantage which would be almost equivalent to closing the door of justice to all small claimants"); Moscarelli v. Stamm (E.D.N.Y. 1968) 288 F.Supp. 453, 461.)

group, would be substantial. Arbitration proceedings may well provide certain offsetting advantages through savings of time and expense; but, depending upon the nature of the issues and the evidence to be presented, it is at least doubtful that such advantages could compensate for the unfairness inherent in forcing hundreds or perhaps thousands, of individuals asserting claims involving common issues of fact and law to litigate them in separate proceedings against a party with vastly superior resources. Because the principles of res judicata and collateral estoppel do not apply in arbitration proceedings, any issue resolved against a party such as Southland in one arbitration proceeding would have to be decided anew in a subsequent arbitration, resulting in needless duplication and the potential for inconsistent awards. And while arbitration ideally takes place outside the judicial arena, it would be naive to assume, in such a situation, that courts would not be called upon to determine issues ancillary to the arbitration proceedings. The effect would be to place upon the parties, and upon the courts, many of the burdens which the class action device was designed to avoid.

It is common knowledge that arbitration clauses frequently appear in standardized contracts of adhesion. A primary consideration which has led courts to uphold such clauses, despite the adhesive nature of the contract, is the belief that arbitration is not oppressive and does not defeat the reasonable expectations of the parties. (Madden v. Kaiser Foundation Hospitals, supra, 17 Cal.3d 699, 710, 712.) If, however, an arbitration clause may be used to insulate the drafter of an adhesive contract from any form of class proceeding, effectively foreclosing many individual claims, it may well be oppressive and may defeat the expectations of the nondrafting party.

One possible solution to this dilemma would be to hold that arbitration agreements contained in contracts of adhesion may not operate to stay properly maintainable class actions. (See Harris v. Shearson Hayden Stone, Inc. (1981) 441 N.Y.S.2d 70, 76-79 (dis. opns.); cf. Frame v. Merrill Lynch, Pierce, Fenner & Smith, Inc. (1971) 20 Cal.App.3d 668, 672; Vernon v. Drexel

Burnham & Co. (1975) 52 Cal.App.3d 706.) The statutes and public policy supportive of arbitration require, however, that this result be avoided if means are available to give expression to the basic arbitration commitment of the parties. (Graham v. Scissor-Tail, Inc., supra, 28 Cal.3d 807, 831.) We turn our attention, therefore, to the solution offered by franchisees: that the arbitration itself proceed on a classwide basis.

There is, as the parties acknowledge, an absence of direct authority either supporting or rejecting such a procedure. Analogous authority exists, however, with respect to the consolidation of arbitration proceedings involving a dispute which concerns several parties each of whom has an agreement with one or more of the others to arbitrate the dispute. "Although the [Federal Arbitration] Act does not specifically provide for consolidated arbitrations, courts have frequently ordered consolidated arbitration proceedings when the 'interests of justice' so require, either because the issues in dispute are substantially the same and/or because a substantial right might be prejudiced if separate arbitration proceedings are conducted." (Matter of Czarnikow-Rionda Co., Inc. (S.D.N.Y. 1981) 512 F.Supp. 1308, 1309.) Indeed, the Second Circuit has opined that "the liberal purposes of the Federal Arbitration Act clearly require that this act be interpreted so as to permit and even encourage the consolidation of arbitration proceedings in proper cases." (Compania Espanola de Pet., S.A. v. Nereus Ship. (2d Cir. 1975) 527 F.2d 966, 975, cert. den. (1976) 426 U.S. 936; see also, Marine Trading Ltd. v. Ore International Corp. (S.D.N.Y. 1977) 432 F.Supp. 683; Robinson v. Warner (D.C.R.I. 1974) 370 F.Supp. 828.)

Federal courts, in ordering consolidation of arbitration proceedings in these cases, have relied upon rule 81(a)(3) of the Federal Rules of Civil Procedure, which states that the federal rules apply to certain statutes, including the FAA, "only to the extent that matters of procedure are not provided for in those statutes." Thus, rule 42(a), which provides for consolidation of related proceedings, is deemed to apply. Analogous reasoning would support reliance on rule 23, the class action rule, as a

basis for ordering classwide arbitrations when the interests of justice so require.

A number of state courts also support consolidation of arbitration proceedings, even in the absence of express statutory authority. New York courts take the position that "jurisdiction to enforce contracts to arbitrate imports power to regulate the method of enforcement." (Chariot Textiles Corp. v. Wannalancit Textile Co. (1964) 250 N.Y.S.2d 493, 495 (dis. opn.), revd. on dis. opn. (1966) 275 N.Y.S.2d 382 [221 N.E.2d 913]; see also In re Vigo Steamship Corporation (1970) 257 N.E.2d 624, cert. den. *sub nom.*, Frederick Snare Corp. v. Vigo Steamship Corp. (1970) 400 U.S. 819; accord: Grover-Dimond Assoc. v. American Arbitration Ass'n (Minn. 1973) 211 N.W.2d 787; see also, Exber, Inc. v. Sletten Construction Company (Nev. 1976) 558 P.2d 517; James Stewart Polshek, etc. v. Bergen Iron Wks. (N.J. 1976) 362 A.2d 63; Episcopal Housing Corp. v. Federal Ins. Co. (S.C. 1979) 255 S.E.2d 451; contra: Stop & Shop Companies, Inc. v. Gilbane Building Co. (Mass. 1973) 304 N.E.2d 429; J. Brodie & Son, Inc. v. George A. Fuller Company (Mich. 1969) 167 N.W.2d 886; see generally, Annot., Consolidation of Arbitration Proceedings, 64 A.L.R.3d 528, 529.) In California, consolidation in certain cases is expressly authorized by statute. (Code Civ. Proc., § 1281.3.)[19]

Consolidated arbitration often involves a tripartite relationship in which the parties in dispute each have a contract with a third party, but not with each other. Each contract may provide

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19 Section 1281.3 was added in 1978 (Stats. 1978, ch. 260, § 2), apparently in response to a Court of Appeal decision holding that courts of this state lacked authority to order consolidation of arbitration proceedings. (Atlas Plastering, Inc. v. Superior Court (1977) 72 Cal.App.3d 63.) The section permits consolidation of separate arbitration proceedings when "(1) Separate arbitration agreements or proceedings exist between the same parties; or one party is a party to a separate arbitration agreement or proceeding with a third party; and (2) The disputes arise from the same transactions or series of related transactions; and (3) There is common issue or issues of law or fact creating the possibility of conflicting rulings by more than one arbitrator or panel of arbitrators."

a different procedure for arbitration, or a different method of selecting the arbitrator. Federal courts have held that a court "can mold the method of selection and the number of arbitrators to implement the consolidated proceedings." (Matter of Czarnikow-Rionda Co., Inc., supra, 512 F.Supp. at p. 1309.) Similarly, Code of Civil Procedure section 1281.3 provides that consolidated arbitration proceedings may be ordered inter alia, where "one party is a party to a separate arbitration agreement or proceeding with a third party," and that if the agreements do not mesh in their description of procedure, a court has authority to appoint an arbitrator, and to "resolve [conflicts among the agreements] and determine the rights and duties of the various parties to achieve substantial justice under all the circumstances." Thus, a party may be forced into a coordinated arbitration proceeding in a dispute with a party with whom he has no agreement, before an arbitrator he had no voice in selecting and by a procedure he did not agree to.

In these respects, an order for classwide arbitration in an adhesion context would call for considerably less intrusion upon the contractual aspects of the relationship. The members of a class subject to classwide arbitration would all be parties to an agreement with the party against whom their claim is asserted; each of those agreements would contain substantially the same arbitration provision; and if any of the members of the class were dissatisfied with the class representative, or with the choice of arbitrator, or for any other reason would prefer to arbitrate on their own, they would be free to opt out and do so. Moreover, the interests of justice that would be served by ordering classwide arbitration are likely to be even more substantial in some cases than the interests that are thought to justify consolidation. It is unlikely that the state Legislature in adopting the amendment to the Arbitration Act authorizing consolidation of arbitration proceedings, intended to preclude a court from ordering classwide arbitration in an appropriate case. We conclude that a court is not without authority to do so.

Without doubt a judicially ordered classwide arbitration would entail a greater degree of judicial involvement than is

normally associated with arbitration, ideally "a complete proceeding, without resort to court facilities." (East San Bernardino County Water Dist. v. City of San Bernardino (1973) 33 Cal.App.3d 942, 950.) The court would have to make initial determinations regarding certification and notice to the class, and if classwide arbitration proceeds it may be called upon to exercise a measure of external supervision in order to safeguard the rights of absent class members to adequate representation and in the event of dismissal or settlement. A good deal of care, and ingenuity, would be required to avoid judicial intrusion upon the merits of the dispute, or upon the conduct of the proceedings themselves and to minimize complexity, costs, or delay. (See *Class Wide Arbitration: Efficient Adjudication or Procedural Quagmire*? (1981) 67 Va.L.Rev. 789.)

An adhesion contract is not a normal arbitration setting, however, and what is at stake is not some abstract institutional interest but the interests of the affected parties. Classwide arbitration, as Sir Winston Churchill said of democracy, must be evaluated, not in relation to some ideal but in relation to its alternatives. If the alternative in a case of this sort is to force hundreds of individual franchisees each to litigate its cause with Southland in a separate arbitral forum, then the prospect of classwide arbitration, for all its difficulties, may offer a better, more efficient, and fairer solution. Where that is so, and gross unfairness would result from the denial of opportunity to proceed on a classwide basis, then an order structuring arbitration on that basis would be justified.

Whether such an order would be justified in a case of this sort is a question appropriately left to the discretion of the trial court. In making that determination, the trial court would be called upon to consider, not only the factors normally relevant to class certification, but the special characteristics of arbitration as well, including the impact upon an arbitration proceeding of whatever court supervision might be required, and the availability of consolidation as an alternative means of assuring fairness. Whether classwide proceedings would prejudice the legitimate interests of the party which drafted the adhesion agreement must also be considered, and that party

should be given the option of remaining in court rather than submitting to classwide arbitration.

In this case, the trial court did not consider the franchisees' request for classwide arbitration at all, and a fortiori did not consider the facts which we have found to be relevant. Since we are unable to make the determination on this record as a matter of law, the case will be remanded to the trial court on this issue.

The order of the trial court is reversed and the cause is remanded for further proceedings consistent with the opinion herein. In light of our opinion, the petition for writ of prohibition or mandate is denied. Each party to bear their own costs.

*GRODIN, J.

WE CONCUR:

BIRD, C.J.
NEWMAN, J.
REYNOSO, J.

CONCURRING AND DISSENTING OPINION BY RICHARDSON, J.

I concur with the majority's conclusions that the arbitration agreement is enforceable and that Southland did not waive its right to arbitration. I respectfully dissent, however, from the majority's further holdings that the Franchise Investment Law claims are not subject to arbitration and that class action arbitration is an available valid remedy.

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* Assigned by the Chairperson of the Judicial Council.

A. ARBITRABILITY OF THE FRANCHISE INVESTMENT LAW CLAIMS

Contrary to the majority, I believe that the state cannot immunize certain civil actions from application of the Federal Arbitration Act merely by fashioning, after the Federal Securities Act, a statute regulating franchise investments.

The United States Supreme Court in Wilko v. Swan (1953) 346 U.S. 427, held that an arbitration clause contained in a margin agreement was invalid as a forbidden "stipulation" under section 14 of the federal Securities Act of 1933. (15 U.S.C. § 77n.) In so holding, the court observed that two statutory policies were invoked: (1) the Federal Arbitration Act's emphasis on "the need for avoiding the delay and expense of litigation" (*id.*, at p. 431, fn. omitted); and (2) the Securities Act's purpose to protect investors by requiring "full and fair disclosure . . . and to prevent fraud." (*Ibid.*) The high court stressed that "[w]hen the security buyer, prior to any violation of the Securities Act, waives his right to sue in courts, he gives up more than would a participant in other business transactions. The security buyer has a wider choice of courts and venue. He thus surrenders one of the advantages the Act gives him and surrenders it at a time when he is less able to judge the weight of the handicap the Securities Act places upon his adversary." (*Id.*, at p. 435.) In measuring the force of the two policies, the *Wilko* court thus was required to balance two *federal* statutes, the Arbitration and the Securities Acts.

The *Wilko* court identified one important factor in the weighing process, namely, the existence of 15 United States Code section 77v, which establishes an unusually liberal venue provision for Securities Act litigation. This emphasis on venue was subsequently repeated in Scherk v. Alberto-Culver Co. (1974) 417 U.S. 506, in which the high court *declined* to invalidate an arbitration clause in a controversy between foreign and domestic parties concerning an alleged violation of the 1934 Securities Exchange Act. The *Scherk* court specifically emphasized that the 1934 act's venue provision (15 U.S.C. § 78aa) "significantly restrict[s] the plaintiff's choice of

forum" in contrast to section 77v, upon which the court "in particular" relied in *Wilko* v. *Swan*. (*Id.*, at p. 514, fn. omitted.)

In contrast, the case before us concerns a *state* statute which is contrary to the *federal* law. The *Wilko* reasoning in balancing between two federal statutes of equal stature thus is not required here. Moreover, unlike the Securities Act of 1933, the state Franchise Investment Law at issue here does not contain a liberal venue provision comparable to that relied on in *Wilko*. Thus, under the California statute an investor who consents to arbitration, thereby waiving the right to sue, does *not* forego more than other similarly situated parties to routine business contracts or transactions.

No different result is mandated by section 31512 of the Corporations Code, which provides that "Any condition, stipulation or provision purporting to bind any person acquiring any franchise to waive compliance with any provisions of this law or any rule or order hereunder is void." Even if the Legislature had intended that this statute be interpreted according to the principles of *Wilko* v. *Swan*, the section nonetheless impermissibly conflicts with the Federal Arbitration Act. Section 31512 is therefore void under the supremacy clause (U.S. Const., art. VI, § 2) to the extent that it purports to restrict otherwise permissible arbitration in actions, as here, involving interstate commerce.

In reaching its conclusion that application of the Federal Arbitration Act here is not required, the majority wholly ignores a substantial line of very respectable authority. These cases, as I now develop, hold that in enacting the Federal Arbitration Act, Congress created *national substantive law*, which is binding on state courts even in the absence of federal jurisdiction.

In 1959, the United States Court of Appeals for the Second Circuit succinctly expressed the general principle. "We think it is reasonably clear that the Congress intended by the Arbitration Act to create *a new body of federal substantive law* affecting the validity and interpretation of arbitration agreements." (Robert Lawrence Company v. Devonshire Fabrics,

Inc. (2d Cir. 1959) 271 F.2d 402, 406, cert. dism. (1960) 364 U.S. 801, italics added.) The *Lawrence* court observed: "To be sure much of the Act is purely procedural in character and is intended to be applicable only in the federal courts. But Section 2 declaring that arbitration agreements affecting commerce or maritime affairs are 'valid, irrevocable, and enforceable' goes beyond this point and must mean that arbitration agreements of this character, previously held by state law to be invalid, revocable, or unenforceable are now made 'valid, irrevocable, and enforceable.' *This is a declaration of national law equally applicable in state or federal courts.*" (*Id.*, at p. 407, italics added.)

The United States Supreme Court has acknowledged the *Lawrence* holding only in one instance, where it merely noted that the Court of Appeals in the case it was then considering had relied upon the *Lawrence* notion of "national substantive law" to hold that "a claim of fraud in the inducement of the contract generally—as opposed to the arbitration clause itself—is for the arbitrators and not for the courts . . . ." (Prima Paint v. Flood & Conklin (1967) 388 U.S. 396, 399-400.) The high tribunal then affirmed the decision below, "albeit for somewhat different reasons." (*Ibid.*) Thus the Supreme Court has never rejected the long standing doctrine that the Arbitration Act created national substantive law applicable in appropriate circumstances in state courts.

The great majority of lower federal and state courts has continued to adhere to the *Lawrence* holding. (See Annot. (1979) 95 A.L.R.3d 1145, 1151-1161.) A recent expression of this principle is contained in In re Mercury Const. Corp. (4th Cir. 1981) 656 F.2d 933 (en banc) (cert. granted *sub nom.* Moses A. Cone Memorial Hospital v. Mercury Const. Corp. (1982) __ U.S. __ [102 S.Ct. 1426]) (three questions were presented in the petition for certiorari; none specifically concerns the scope of the Arbitration Act although one involves the district court's discretion to stay its proceedings pending resolution of identical issues in a state court action involving identical parties). In discussing the application of the Federal Arbitration Act to state and federal actions the Fourth Circuit

noted: "By its express language the Federal Act applies where there is '[a] written provision . . . in a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . .' 9 U.S.C. § 2. The constitutional validity of such an Act is found in the incontestable federal control over interstate commerce. Prima Paint v. Flood & Conklin, 388 U.S. 395, 405 . . . . The Act, however, does not include language conferring independent federal jurisdiction over an action thereunder. In order for a plaintiff to assert rights under it in a federal forum, he must establish an independent jurisdictional basis, such as diversity. [Citations.] But if, assuming diversity of the parties, the action meets the jurisdictional requirements of the Act, that action is enforceable in the state courts as well as in federal courts but *in either event it is governed by the federal substantive law developed in connection with the federal Act and not by state law*. E.C. Ernst, Inc. v. Manhattan Const. Co., 551 F.2d 1026, 1040 (5th Cir. 1977) (any questions under the Act are matters of 'federal law'); Robert Lawrence Co. v. Devonshire Fabrics, Inc., supra, 271 F.2d at 406; Pathman Const. Co. v. Knox County Hospital Ass'n., 164 Ind. App. 121, 326 N.E.2d 844, 851 (1975); Episcopal Housing Corp. v. Federal Ins. Co., 269 S.C. 631, 636, 239 S.E.2d 647 (1977)." (*Id.*, at p. 938, italics in original, fn. omitted.) As described in *Lawrence*, Congress in enacting the arbitration act sought to counteract the hostility of courts and judges to arbitration agreements and to "make the benefits of arbitration generally available to the business world." (271 F.2d at pp. 406-407; see Prima Paint v. Flood & Conklin, supra, 388 U.S. at p. 405 [Congress "plainly" had power to legislate over arbitration].)

Despite the majority's recognition of the large body of law holding that the act is applicable in state courts in appropriate cases, my colleagues seek to create, judicially, an exception for certain state regulatory practices based on some conclusion that Congress did not intend to preempt the area of franchise regulation. The majority, however, fails to acknowledge that Congress has indeed preempted the field of arbitration as applied to *any* contract in interstate commerce to the extent

that title 9 of the United States Code applies. No one has urged before us that there is any basis other than the state regulatory statute upon which to deny application of the Federal Arbitration Act to the contract at issue.

In addition to encouraging the enforcement of arbitration agreements, the Arbitration Act also restricts the benefits of the usually disfavored practice of forum shopping. As the majority recognizes, the likely explanation for the federal district court's remand of the action here was that complete diversity did not exist because of the presence of California defendants. Had those defendants not been named, which was, of course, well within a franchisee's power to choose, the answer would have been easy. The action could have been readily removed to the federal courts on the basis of diversity and the Arbitration Act unquestionably would have applied. It will thus be seen that the majority implicitly makes the existence or nonexistence of federal jurisdiction the determinative factor in the enforcement of the arbitration clause rather than the existence of a "transaction involving commerce . . . ." In so concluding, the majority ignores the critical distinction which exists in the Arbitration Act between the conferral of federal jurisdiction and the creation of federal substantive law applicable in state courts. This promotes forum shopping.

In a similar context, the court in In re Mercury Const. Corp., supra, specifically observed that, "The addition of the Architect as a party defendant might prevent removal of the state action . . . but it certainly could not frustrate Mercury's plain, indisputable right to an arbitration of *its* dispute with the Hospital." (636 F.2d at p. 942.) The Arbitration Act, construed as national substantive law binding on both federal and state courts, advances consistency.

Finally, I find it significant that sister courts which have specifically considered state statutes analogous to the one before us have found that the Arbitration Act prevails over various state attempts to limit its reach. Thus, in Allison v. Medicab (Wash. 1979) 597 P.2d 380, the Washington Supreme Court reviewed a claim that an arbitration clause in a franchise agreement was invalid under the state's franchise act which

gave to the state courts jurisdiction for causes of action based on violations of the state act. Finding that interstate commerce was involved, the *Allison* court rejected the argument that *Wilko* v. *Swan*, supra, applied to a conflict between a state franchising act and the Federal Arbitration Act. The *Allison* court instead adopted the weight of authority rule applying the federal act in the face of a contrary state law (*id.*, at p. 382), concluding that "the *supremacy clause of the federal constitution must prevail and thus the Federal Arbitration Act requires enforcement of the arbitration clause in the franchise agreement despite the judicial remedies afforded by the Franchise Investment Protection Act.*" (597 P.2d at pp. 382-383, italics added.)

In similar fashion, in Network Cinema Corporation v. Glassburn (S.D.N.Y. 1973) 357 F.Supp. 169, the federal district court granted an order staying proceedings in a Kansas state court pending arbitration of a dispute between franchisor and franchisee. The Kansas court had held that the arbitration clause signed by the parties was not enforceable under state law. The federal court nonetheless found that it was empowered to stay state proceedings "when the dispute in question has been found by the court to be subject to the arbitration provisions of 9 U.S.C. § 2." (*Id.*, at p. 172, see also Main v. Merrill Lynch, Pierce, Fenner & Smith, Inc. (1977) 67 Cal.App.3d 19, 23-25, and cases cited therein [" 'The Federal Arbitration Act, declaring arbitration agreement affecting [interstate] commerce or maritime affairs to be valid, enforceable, and irrevocable, is a declaration of national law equally applicable in state or federal courts' "]; Fite & Warmath Const. Co., Inc. v. MYS Corp. (Ky. 1977) 559 S.W.2d 729, 734-735.)

Finally, in Barron v. Tastee-Freez Intern., Inc. (E.D.Wisc. 1980) 482 F.Supp. 1213, the federal district court considered the enforcement of an arbitration clause in the face of a state statute analogous to section 31512, which it characterized as similar to 15 United States Code section 77n. (482 F.Supp. at pp. 1215-1216.) The court felt compelled by the Federal Arbitration Act "to render void any effort made by a state to protect the remedies of the franchise investors" contrary to the

federal act in cases in which the transactions related to interstate commerce. (*Id.*, at p. 1217; see also Guinness-Harp Corp. v. Jos. Schlitz Brewing (2d Cir. 1980) 613 F.2d 468, 472.) "The policy embodied in Title 9 U.S.C. . . . does not depend for its enforceability on the residence of the parties to a contract but rather on the nature of the contract." (Barron v. Tastee-Freez Intern., Inc., supra, 482 F.Supp. at p. 1217.)

The majority attempts to remove a state regulatory statute from the purview of the Federal Arbitration Act in cases involving interstate commerce. In my opinion, its chances of surviving federal review are very dubious. I believe section 31512 is void insofar as it attempts to restrict application of the federal act. Contrary to the majority's assertion, the issue is not the preemption of the field of franchise investment regulation, but rather the clear language of the federal act and the subsequent state and federal court interpretations which consistently demonstrate that the Federal Arbitration Act applies to all claims arising out of transactions in interstate commerce. "Because the United States Arbitration Act is a national substantive law that supplants state arbitration laws, *a state court is bound to apply the act* if the statutory requisites are present; . . ." (Merrill Lynch, Pierce, Fenner, etc. v. Haydu (5th Cir. 1981) 637 F.2d 391, 395, italics added.) As the majority first acknowledges and then ignores, "The Franchise Agreements . . . involve interstate commerce and fall within the ambit of the Federal Arbitration Act." (*Ante*, p. 4a.) The conclusion that the federal act must prevail is logical, consistent and supported by case law, statutory language, and congressional history. California remains one of the United States, and national substantive law must be applied by us in appropriate cases.

B. Class Action Arbitration

The majority also concludes that class action arbitration may be an appropriate procedure and has remanded the case for determination by the trial court. In the absence of either statutory or contractual authority, I disagree with its holding.

Arbitration is a matter of agreement. It is consensual, being an integral part of the contract. In such situations we have said that the parties "may freely delineate the area of its application." (O'Malley v. Wilshire Oil Co. (1963) 59 Cal.2d 482, 490; see Reid Burton Const. v. Carpenters Dist. Council, etc. (10th Cir. 1980) 614 F.2d 698, 702, cert. den. __ U.S. __, 101 S.Ct. 85.) As a general principle, in considering contract enforcement, "there is perhaps no higher public policy than to uphold and give effect to contracts validly entered into and legally permissible in subject matter." (Vernon v. Drexel Burnham & Co. (1975) 52 Cal.App.3d 706, 716.)

In the present case, the contracts of the parties do not provide for class arbitration, nor have the parties subsequently agreed thereto. No statute authorizes a court to order arbitration on a class-wide basis. Nonetheless, the majority concludes that such a procedure is possible in order to prevent repetitive arbitration and to avoid "effectively foreclosing individual claims" in instances where the arbitration contract "may be used to insulate the drafter of an adhesion contract from any form of class proceeding." (*Ante*, p. 25a.)

A recent New York case examined the propriety of the class action device used in arbitration. Harris v. Shearson Hayden Stone, Inc. (N.Y.App. 1981) 441 N.Y.S.2d 70, weighed the policies favoring class actions and arbitration and concluded that the filing of a class action alleging a broker's breach of fiduciary duty would not permit avoidance of an agreement to arbitrate. The agreement was contained in a "customer's agreement" which the brokerage firm required all customers to sign. Citing the consistent holdings of our Courts of Appeal in Vernon v. Drexel Burnham & Co., supra, 52 Cal.App.3d 706, 716, and Frame v. Merrill Lynch, Pierce, Fenner & Smith (1971) 20 Cal.App.3d 668, 672, the New York court held that "maintenance of a class action here by assertion of a claim for which a forum is provided elsewhere, would defeat the aim of arbitration, and undercut an avowed purpose of the class action itself—the 'conservation of judicial effort.'" (441 N.Y.S.2d at p. 76.)

In dissent, Justice Bloom urged that the conflict should be resolved in favor of the class action. Even he, however, expressly rejected the idea of a "class arbitration" saying, "Nor is it an answer to assert that the dispute between plaintiffs and Shearson may be proceeded with as a 'class arbitration.' Arbitration does not lend itself to the many subsidiary proceedings incident to an ongoing class action, e.g. determination of whether class action status should be granted, definition of the class, determination of the nature and kind of notice and by whom it should be sent, provision for opting out, etc. In sum, if the matter is to proceed in arbitration it must proceed as an individual claim." (*Id.*, at p. 79; cf. Coleman v. National Movie-Dine, Inc. (E.D.Pa. 1978) 449 F.Supp. 945, 948 ["Arbitration should not be foreclosed simply by adding persons to a civil action who are not parties to the arbitration agreement because such an inclusion would thwart the federal policy in favor of arbitrations. (Citations.)"].) Thus in weighing the policies behind class actions and arbitration, other courts have found that class actions will not prevail where there is an individual arbitration agreement.

In addition to the concerns mentioned by Justice Bloom, other factors belie franchisees' assertion that class certification would be only a "preliminary" issue. For example, a court, in determining whether class proceedings are appropriate, must be satisfied that there is a "community of interest"; i.e., that common issues predominate over individual issues. (See Code Civ. Proc., § 382; City of San Jose v. Superior Court (1974) 12 Cal.3d 447, 459-460; Fed. Rules Civ. Proc., rule 23, 28 U.S.C.) In determining whether a "community of interest" exists, a court must carefully evaluate the nature of the proof that will be presented by the parties (*City of San Jose,* supra, at p. 460; Abercrombie v. Lum's Inc. (S.D.Fla. 1972) 345 F.Supp. 387, 390), and the parties are likely to devote extensive resources to developing the facts and arguments fully in regard to the usually complex certification issues. (See, e.g., Chance v. Superior Court (1962) 58 Cal.2d 275, 282-287; Blackie v. Barrack (9th Cir. 1975) 524 F.2d 891, 900-901.)

Moreover, class action procedures would interfere with the expeditious resolution of the claims. After certification of a class, the court must notify class members of the existence of the suit so that they will have the opportunity to "opt out." (Fed. Rules Civ. Proc., rule 23(c), 28 U.S.C.) Because of the due process safeguards required to keep class members apprised of the course of the litigation, substantial judicial involvement by the court will be required to monitor the progress of the arbitration and potentially will undermine the arbitrator's discretion. In fact, the court's due process responsibilities include the duty to "undertake a stringent and continuing examination of the adequacy of representation by the named class representative at all stages of the litigation." (Nat. Assn. of Reg. Med. Programs, Inc. v. Mathews (D.C.Cir. 1976) 551 F.2d 340, 344, cert. den. 431 U.S. 954.)

Yet another consideration arises from the fact that unlike settlements reached through arbitration, which are ordinarily not subject to court review on either procedural issues or the merits (see Barrett v. Manuf. Ry. Co. (8th Cir. 1972) 453 F.2d 1305, 1307), a class action settlement normally does not become final without court approval. (La Sala v. Am. S. & L. Assn. (1971) 5 Cal.3d 864, 872; Fed. Rules Civ. Proc., rule 23(e), 28 U.S.C.; In re General Motors Corp. Engine Interchange Litig. (7th Cir. 1979) 594 F.2d 1106, 1124, cert. den. 444 U.S. 870.) The court must review the entire proceedings to determine if the settlement was fair, reasonable, and adequate in light of the strength of each party's case (Marshall v. Holiday Magic, Inc., (9th Cir. 1977) 550 F.2d 1173, 1178-1179), and take evidence on any substantial objection to the proposed settlement brought by any class member. (Mandujano v. Basic Vegetable Products, Inc. (9th Cir. 1976) 541 F.2d 832, 835-836.)

Finally, the normally "informal" nature of arbitration requires no transcripts. Arbitrators generally need not explain the basis for their decision. (Bernhardt v. Polygraphic Co. of America (1956) 350 U.S. 198, 203-204, and fn. 4.) The absence of a record further complicates the use of class proceedings, because without a record a court may have difficulty in applying an arbitrator's decision to all class members, since it

could not determine whether the arbitrator's judgment was applicable to each member of the class, or based on equities applicable only to the individual claimant. Similarly, objection to settlements would be difficult to assess.

In addition, arbitrators, of course, are not necessarily either lawyers or judges. Requiring the administration of complex class procedures during arbitration may either make lay experts unavailable as arbitrators as a practical matter, or result in intrusive judicial participation and supervision.

In summary, class procedures would tend to make arbitration inefficient instead of efficient, lengthy instead of expeditious, and procedural instead of informal. " 'An arbitration proceeding is, except in specified particulars, outside the court realm and jurisdiction—deliberately so taken out of the court by choice and commitment of the parties. Arbitration is subject to its own rules and practices at variance with court proceedings. It is supposed to be a complete proceeding, without resort to court facilities . . . . It would be generally incompatible with the nature and scope of arbitration to allow a shift to the court forum . . . .' (*Application of Katz*, 3 App.Div.2d 238, . . .)" (East San Bernardino County Water Dist. v. City of San Bernardino (1973) 33 Cal.App.3d 942, 950.)

In my view, because of the complications resulting from continued judicial monitoring, the imposition of class action procedures on the arbitration process would be self-defeating.

Nonetheless, by analogy to consolidated arbitration proceedings, the majority insists that *class arbitration* is an available remedy. However, several factors make this analogy less than compelling. In Atlas Plastering, Inc. v. Superior Court (1977) 72 Cal.App.3d 63, Atlas, a general contractor, sought to consolidate arbitration proceedings between itself and several subcontractors, each of whom had entered into identical arbitration agreements with Atlas. The *Atlas* court held that, because the parties had not agreed to consolidated proceedings and because consolidation would deprive the individual subcontractors of their right to choose an arbitrator in the manner set forth in the arbitration agreement, the court lacked the

power to order consolidated proceedings. (Code Civ. Proc., § 1281.6.) When *Atlas* was decided, no statute authorized a court to order consolidation of arbitrations.

Following the decision in *Atlas*, the Legislature enacted Code of Civil Procedure section 1281.3 which specifically authorizes consolidated arbitration at the court's discretion under certain circumstances. This section was relied upon in Conejo Valley Unified School Dist. v. William Blurock & Partners, Inc. (1980) 111 Cal.App.3d 983, in which a party to an arbitration agreement was compelled to arbitrate his claim in consolidated proceedings despite the fact that the agreements contained conflicting provisions for choosing an arbitrator. The *Conejo* court held that section 1281.3 did not create substantive rights, but was a procedural statute and that therefore no constitutional bar to its retroactive application existed.

Unlike the *Conejo* situation, there is no state statute which permits a court to order arbitration proceedings on a class-wide basis when the contractual arrangement of the parties does not authorize it. The Legislature examined the specific problems of related arbitration proceedings when it permitted the consolidation of arbitration. After scrutinizing these problems the Legislature declined to provide for class arbitration.

Nor, as the majority concedes, is there any federal authority for class arbitration. Although federal courts have ordered consolidated arbitration under the authority of rule 42(a) of the Federal Rules of Civil Procedure, the courts have attempted to assure each party the right to select an arbitrator and to express their individual views. (See, e.g., Compania Espanola de Pet., S.A. v. Nereus Ship. (2d Cir. 1975) 527 F.2d 966, 974-975, cert. den. (1976) 426 U.S. 936; Marine Trading Ltd. v. Ore Intern. Corp. (S.D.N.Y. 1977) 432 F.Supp. 683, 685; Robinson v. Warner (D.R.I. 1974) 370 F.Supp. 828, 829.) In fact, the issue of the application of *consolidation* to arbitration proceedings is not a settled matter in the federal courts. (See Gavlik Construction Co. v. H.F. Campbell Co. (W.D.Pa. 1975) 389 F.Supp. 551, 556, revd. on other grounds (3d Cir.) 526 F.2d 777; see also Robinson v. Warner, supra, at p. 830.)

In the absence of a statute authorizing class arbitration or agreement of the parties, it is inappropriate in my view for us, judicially, to superimpose such a procedure on the arbitration process over objections of a party to the contract. (Compare, Stevenson v. Com., Dept. of Revenue (Pa. 1980) 413 A.2d 667 [the Pennsylvania Board of Arbitration of Claims Act specifically incorporates procedures embodied in rules of Pennsylvania civil procedure and class action is therefore available to parties appearing before board].)

The majority is compelled to acknowledge that class-wide arbitration "would entail a greater degree of judicial involvement than is normally associated with arbitration . . . ." (*Ante*, p. 28a-29a.) Nonetheless, it argues that if the alternative would be to require hundreds of individual arbitration proceedings, then such a procedure may be appropriate. I believe, however, that the majority fails to accord proper deference to the recognized principle that arbitration is a *favored* means of dispute resolution because it permits a *non-judicial, informal,* and *speedy* alternative to litigation. (See, e.g., Taylor v. Crane (1979) 24 Cal.3d 442, 452; Doers v. Golden Gate Bridge etc. Dist. (1979) 23 Cal.3d 180, 189; Aerojet-General Corp. v. American Arbitration Assn. (9th Cir. 1973) 478 F.2d 248, 251.) The injection of class action procedure into the arbitration process *in the absence of either statutory authority or contractual agreement* conflicts with these settled principles as well as with the specific contract terms to which the parties agreed. "It is axiomatic that commercial arbitration is to be based on a voluntary agreement of the parties[;] only then can the concept of arbitration be well understood. In other words, nobody should be bound to resort to arbitration unless he has previously agreed to that method of dispute settlement." (Domke on Commercial Arbitration (1968) § 1.02, p. 5.)

The franchisees here do not contend that they would be unable to proceed individually in separate or consolidated arbitration proceedings. We are not confronted with a situation in which a plaintiff contends that it would be economically unfeasible to mount a challenge in the absence of a class

proceeding. In fact, not all of the actions before us have been brought as class actions. It is very clear that the individual franchisees have been fully able to proceed.

In a case where class proceedings provide the only economical method of presenting a claim, an alternative exists which would protect both the contractual integrity of proper arbitration agreements and the interests of individual claimants. One solution which has been suggested, and which the majority rejects, "would be to hold that arbitration agreements contained in contracts of adhesion may not operate to stay properly maintainable class actions." (*Ante*, p. 25a.) I agree that as a general rule such a holding would be contrary to the basic arbitration agreement of the parties and to the policy favoring arbitration. There is, however, another alternative. Under settled principles of law, arbitration clauses in adhesion contracts may be declared invalid where they are "beyond the reasonable expectations of an ordinary person . . ." (Wheeler v. St. Joseph Hospital (1976) 63 Cal.App.3d 345, 357) or bear oppressively on the weaker party. (Madden v. Kaiser Foundation Hospitals (1976) 17 Cal.3d 699, 710; Graham v. Scissor-Tail, Inc. (1981) 28 Cal.3d 807, 820.) Thus, where an arbitration clause in an adhesion contract would allow the stronger party to evade responsibility for its acts, such a clause may, under those facts, be found oppressive and the clause invalidated. In instances where an arbitration clause would effectively deny relief to the weaker party in an adhesion contract, relief under settled principles of law would potentially be available. As the majority concludes, there is no such evasion of liability here, and consequently, there is no need for an extraordinary remedy such as the one proposed by the majority.

In summary, the majority, in the absence of any contractual, statutory, or judicial authority or any demonstrated need, has seen fit to invent a procedure which is fundamentally contrary to the purpose of arbitration and to the public policy encouraging arbitration. Potentially, the majority's holding will effectively render arbitration clauses in all adhesion contracts subject to class treatment, thus engrafting on an informal,

speedy method of dispute resolution which often utilizes non-legal arbitrators a complex legal procedure which will require close court supervision and frequent intervention antithetical to the essential informal and nonjudicial nature of the arbitration process.

CONCLUSION

From the foregoing, I conclude that the trial court erred in holding that the Franchise Investment Law claims were not arbitrable in the face of the clear national substantive law to the contrary. I would reverse the trial court judgment to the extent that it denies arbitration of these claims. In addition, I conclude that in the absence of any statutory or contractual agreement to the contrary, the strong policy reasons favoring arbitration as a speedy, informal, and nonjudicial method of dispute resolution militate against the remand of this case to the trial court to permit it to determine whether class arbitration may be an appropriate procedure. I would affirm the trial court's order referring the individual cases to arbitration, recognizing that *consolidation* of the individual arbitrations might be proper.

RICHARDSON, J.

I CONCUR:

MOSK, J.

APPENDIX B

Court of Appeal, First District, Division 3

Civ. 45162, Civ. 46123

Aug. 28, 1980

Rehearing Denied Sept. 26, 1980

RICHARD D. KEATING et al.,

Petitioners,

—v.—

SUPERIOR COURT, ALAMEDA COUNTY,

Respondent,

THE SOUTHLAND CORPORATION et al.,

Real Parties in Interest.

PAULINO GARZA et al.,

Plaintiffs and Respondents,

—v.—

THE SOUTHLAND CORPORATION et al.,

Defendants and Appellants.

[And 8 other cases.]*

* *Cheng v. The Southland Corporation; Newell v. The Southland Corporation; Sampson v. The Southland Corporation; Gouveia v. The Southland Corporation; Battersby v. The Southland Corporation; Keating v. The Southland Corporation; Coy v. The Southland Corporation; The Southland Corporation v. Scovis.*

FEINBERG, Associate Justice.

Pursuant to stipulation, we ordered these two cases consolidated because both concern the trial court's orders regarding the propriety of arbitration vis-a-vis franchisors and franchisees.

In *Keating, et al. v. Superior Court*, petitioners (franchisees), seek a writ of prohibition or mandate to set aside the trial court's order to arbitrate pursuant to a contractual arbitration provision. Petitioners claim that the trial court erred: (1) by ruling that the contracts containing the arbitration clauses were not contracts of adhesion and by denying petitioners an evidentiary hearing concerning the validity of the arbitration clauses before ordering arbitration; (2) by failing to find that real parties had waived the right to compel arbitration; and (3) by failing to decide certain class action issues before ordering arbitration so that any arbitration could be conducted on a class-wide basis.

In *Garza, et al. v. The Southland Corporation, et al.*, appellants (franchisors), claim that the trial court erred by failing to order arbitration of certain claims based upon the California Franchise Investment Law. They contend that, by their terms, the arbitration clauses require this result and that Corporations Code section 31512 does not invalidate contractual provisions calling for arbitration of claims arising under the Franchise Investment Law.

KEATING, ET AL. v. SUPERIOR COURT

Petitioners are current and former franchise operators of 7-Eleven Stores in the Bay Area. Real parties are The Southland Corporation (franchisors) and various current and former employees of the corporation. This petition arises from a group of cases which were coordinated under the title "Market Franchise Cases" (Judicial Council Coordination Proceeding No. 387).[1] Petitioners' complaints included claims

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1 The coordinated actions are:

Gouveia v. The Southland Corporation (Gouveia), filed September 1975;

of fraud, misrepresentation and breach of contract, in addition to allegations of violations of the Franchise Investment Law.

Real parties filed their first petition to compel arbitration on September 28, 1977 in the *Keating* case. Ultimately, similar petitions were filed in all of the cases, and those petitions were granted with respect to all matters except the Franchise Investment Law claims.

I. *The trial court did not err by denying petitioners an evidentiary hearing concerning the validity of the arbitration clauses before ordering arbitration.*

All of the franchise agreements contained arbitration provisions. Real parties assert that the clause contained in the Keating contract is identical to or representative of the provisions contained in the other contracts. That clause is reproduced in the margin.[2]

Garza v. The Southland Corporation (Garza), filed September 1976;

Sampson v. The Southland Corporation (Sampson), filed October 1976;

Cheng v. The Southland Corporation (Cheng), filed December 1976;

Newell v. The Southland Corporation (Newell), filed January 1977;

Keating v. The Southland Corporation (Keating), filed May 1977; and

Battersby v. The Southland Corporation (Battersby), filed December 1977.

Two other actions have been coordinated which are not the subject of this petition: *Coy v. The Southland Corporation*, filed March 1978, and *Scovis v. The Southland Corporation*, filed April 1978.

2 Article 35. Arbitration.

(a) Unless prohibited by applicable law, any controversy or claim arising out of or relating to this Agreement or the breach hereof shall be settled by arbitration in accordance with the Rules of the American Arbitration Association (the "Association") and judgment upon any award rendered by the arbitrator may be entered in any court having jurisdiction thereof.

(Footnote continued on following page)

In his declaration in opposition to real parties' petition to compel arbitration, Richard D. Keating stated that:

". . .

"2) Other than the information that is set forth in an American Arbitration Association pamphlet . . . and the

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(b) Any demand for arbitration shall contain a statement setting forth the nature of the dispute, the amount involved, if any, and the remedy sought.

(c) Any demand for arbitration which may be based in whole or in part on wrongful Termination shall be filed within ten days after a 30 day or longer notice of Termination is issued and prior to any other notice of Termination becoming effective.

(d) Any other demand for arbitration may be filed with the Association and served on the other party at any time during the term of this Agreement or within the period provided by the applicable statute of limitations.

(e) Arbitration shall not proceed until any protest of arbitrability is resolved by an appropriate court, if necessary.

(f) A demand for arbitration or proceedings in arbitration shall not operate to stay, postpone, prohibit or rescind any Expiration or Termination or the right of 7-ELEVEN to take possession of the Leased Property in accordance with this Agreement (unless otherwise provided by applicable law), and the parties will be relegated to their remedy in damages, as determined by the arbitrator, for Expiration or Termination found by the arbitrator to be wrongful.

(g) The arbitrator shall have authority to assess damages sustained by reason of any breach of this Agreement.

(h) The arbitrator shall not extend, modify or suspend any of the terms of this Agreement or the reasonable standards of business performance set by 7-ELEVEN in good faith.

(i) The decision of the arbitrator within the scope of the submission (as provided in this Article 35) shall be final and binding on all parties, and any right to judicial action on any matter subject to arbitration hereunder is hereby waived (unless otherwise provided by applicable law), except suit to enforce the arbitration award or in the event arbitration is not available for any reason other than for the time periods provided herein.

(j) The parties shall share equally all expenses of the arbitrator and the Association, and each party shall bear his own expenses incident to the arbitration.

(k) If the rules of the Association differ from this Article 35, the provisions herein shall control.

information that is set forth in the Southland Store Agreement within the arbitration paragraphs . . . and what was set forth on page SA-78 . . . , I was given no verbal or written explanation of the meaning of arbitration, the concept of an arbitration proceeding, the fact that it involved my waiver of my constitutional rights to a jury trial, a loss of the right to utilize the protection of the courts in the discovery process, nor any information with respect to what arbitration would cost in a procedure of this type;

"3) The Southland agreements were presented to me by Southland representatives on a take it or leave it basis. I was given no opportunity to bargain or to negotiate with respect to any paragraph or clause within the said agreements. I was advised in effect, that the only way I could obtain the 7-11 franchise was to acquiesce to the entire printed agreement that was presented to me by the Southland representatives.

"4) There was nothing presented to me in writing or verbally that bore on the subject of the scope or limits of the subject matter to which the arbitration paragraphs purportly [sic] apply;

"5) The first time that I was aware of any aspect of what the arbitration clause might conceivingly [sic] be interpreted as meaning and the effect that said clause would have on my right to a jury and discovery and the possible impact on me as to the cost of such arbitration, occurred after I first contacted my attorneys in this case."

The American Arbitration Association pamphlet to which the declaration refers includes a reproduction of a sample commercial arbitration clause and general information about the association and its services. The association's tribunals were described as follows: "Important arbitration tribunals of AAA are: Commercial, Accident Claims, Labor and International. Each tribunal is administered under Rules which govern conduct of parties, arbitrators and the administrative agency. Members of the Association and non-members are treated equally. Arbitrations conducted in this way result in awards

that are enforceable under law. The Association cooperates closely with lawyers and trade associations." The other information to which the Keating declaration refers is the following statement which appeared in very large print by itself under an even larger caption, "ARBITRATION."

> "SHOULD A DISPUTE ARISE BETWEEN YOU AND 7-ELEVEN, THE DISAGREEMENT WILL BE SETTLED BY THE AMERICAN ARBITRATION ASSOCIATION."

The trial court found that the contracts were not adhesion contracts, as a matter of law.

Petitioners contend that Keating's affidavit raised a triable issue of fact concerning the validity of the arbitration clauses which should have been resolved before arbitration was ordered. They argue that, not only did the affidavit establish that the clauses were part of adhesion contracts about which petitioners were unable to bargain or negotiate, but also that the affidavit demonstrated real parties' failure to inform petitioners that agreeing to arbitration would result in waiving their rights to jury trial, discovery and punitive damages as a remedy for fraud nor were they informed of the costs of arbitration in an "unusual" or "complex" case such as this one.

Initially, it should be noted that since the franchise agreements were between a Texas corporation and California residents, entailed the right to use federally registered trademarks, and contemplated a continuing business relationship between the parties across state lines, they involve interstate commerce and fall within the ambit of the Federal Arbitration Act.[3]

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3 Section 2 of the act provides that: "A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." (9 U.S.C., § 2.) "Commerce" is defined, in part, as "commerce among the several States." (9 U.S.C., § 1.)

However, we find it unnecessary to address the subject of preemption at this juncture because we have concluded that both federal and state law require us to reject petitioners' adhesion contract theory.

Since petitioners were neither consumers nor persons who would have had to accept the agreements at issue or forego necessary goods or services, the franchise agreements were not made in the setting in which the courts are most concerned with the doctrine of adhesion contracts. (*Madden v. Kaiser Foundation Hospitals* (1976) 17 Cal.3d 699, 711, 131 Cal.Rptr. 882, 552 P.2d 1178.) Petitioners were persons interested in establishing a beneficial business relationship with Southland Corporation, who, no doubt, could have gone elsewhere if they were dissatisfied with the proffered arrangement. Nevertheless, it cannot be said that the parties possessed absolute parity of bargaining power. Southland drafted the contracts, and Keating claimed that they were present [sic] on a "take it or leave it" basis, a fact which is relevant to the determination of whether a contract is one of adhesion. (*Id.*, at pp. 710-711, 131 Cal.Rptr. 882, 552 P.2d 1178; *Rust v. Drexel Firestone Inc.* (S.D.N.Y. 1972) 352 F.Supp. 715, 717.)

However, the critical question under both the federal and California standards does not appear to be whether an agreement is an adhesion contract but, rather, whether the arbitration clause itself is oppressive or defeats the reasonable expectations of the parties. (*Arkoosh v. Dean Witter & Co., Inc.* (D.Neb. 1976) 415 F.Supp. 535, 543; *Madden v. Kaiser Foundation Hospitals, supra,* 17 Cal.3d at pp. 710, 712, 131 Cal.Rptr. 882, 552 P.2d 1178.) There is no indication that the franchisees and the franchisors were not equally affected by the arbitration clause.

Despite the importance of the constitutional right to a jury trial in a civil case (U.S.Const., 7th Amend.; Cal. Const., art. I, § 16), the failure to include an express waiver of this right in an arbitration agreement does not render the agreement unenforceable. (*Madden v. Kaiser Hospitals, supra,* 17 Cal.3d at p. 714, 131 Cal.Rptr. 882, 552 P.2d 1178.) Given this proposition, a fortiori, such an express waiver was not required respecting

petitioners' rights to discovery and punitive damages nor were real parties required to give petitioners the aforementioned information regarding costs in order for the arbitration provision to be enforceable.

Petitioners rely upon *Main v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1977) 67 Cal.App.3d 19, 24, 136 Cal.Rptr. 378, 380, in which Justice Molinari stated that: "The [Federal] Arbitration Act provides for a 'trial,' by jury if requested, of the issue of whether a *valid* agreement to arbitrate the subject dispute is existent [citation]; the issue to be resolved does not concern 'the merits of the controversy as to which arbitration is sought.' [Citation.] The issue ' " 'should not be determined on affidavits, but rather a full trial should be had.' " ' (*A/S Custodia v. Lessin International, Inc.* (2d Cir. 1974) 503 F.2d 318, 320; *El Hoss Engineer. & Transport Co. v. American Ind. Oil Co.* (2d Cir. 1961) 289 F.2d 346, 351 [cert. den., 368 U.S. 837, [82 S.Ct. 51, 7 L.Ed.2d 38] . . .].)" However, the federal cases upon which Justice Molinari relied did not raise the issue presented here. Furthermore, *Main* is distinguishable from the instant case because petitioners have not alleged that real parties' conduct constituted fraud which permeated the entire agreement or induced the arbitration clause itself, as did the plaintiff in *Main*. (67 Cal.App.3d at pp. 27, 33, 136 Cal.Rptr. 378.)

Petitioners also rely upon *Wheeler v. St. Joseph Hospital* (1976) 63 Cal.App.3d 345, 361, 133 Cal.Rptr. 775, 786, in which the court concluded "that in order to be binding, an arbitration clause incorporated in a hospital's 'CONDITIONS OF ADMISSION' form should be called to patient's attention and he should be given a reasonable explanation of its meaning and effect, including an explanation of any options available to the patient." Not only is *Wheeler* distinguishable given the circumstances peculiar to the hospital admission situation (*id.*, at pp. 357-358, 133 Cal.Rptr. 775), Keating's affidavit showed that he was aware of the clause's existence, and demonstrated that he should have been aware what the clause meant, namely, if arbitration were sought, he would be compelled to forego his right to a judicial forum. In *Wheeler* the court wrote that "The

hospital's admission clerk need only direct the patient's attention to the arbitration provision, request him to read it, and give him a simple explanation of its purpose and effect, including the available options. Compliance will not require the presence of the hospital's house counsel in the admission office." (Id., at p. 361, 133 Cal.Rptr. at p. 786, fn. omitted.) Given the propriety of such a "simple explanation" in the medical services context, we do not believe that *Wheeler* supports the kind of explanation to which petitioners claim they were entitled.

The trial court did not err by refusing to conduct an evidentiary hearing concerning the validity of the arbitration clause under the principles of adhesion contracts before ordering arbitration.

II. *Real parties did not waive their contractual right to compel arbitration.*

In rejecting petitioners' waiver argument, the trial court reasoned that although it probably would have concluded that there had been a waiver of the right to compel arbitration in some of the cases, such a ruling was not appropriate because (1) the second amended complaint raised certain issues, exclusive of the Franchise Investment Law claims, which would otherwise be arbitrable and "it would serve no one's purpose to order that those newly added matters of the second amended complaint should be submitted to arbitration, and other matters not . . ." and (2) it would detract from the achievement of consistency in the coordinated cases. The trial court also added the following condition to its order: "To the extent that this order grants Southland's petitions for order to compel arbitration, said petitions are granted on the condition that Southland either abstain from the use of any discovery that it has had in any of the above actions, or that Southland stipulate to discovery of at least an equally extensive nature on behalf of the plaintiffs in these actions."

Once again, there is a question of whether this issue is governed by federal or state law. However, it appears that petitioners' contention fails in either case.

The right to seek arbitration may be waived (9 U.S.C. section 3; Code Civ. Proc. section 1281.2, subd. (a)). It appears that when a claim of waiver is based upon actions taken before a court, the federal rule directs that the issue be resolved by the court rather than by the arbitrator. (*Weight Watch. of Quebec Ltd. v. Weight W. Int., Inc.* (E.D.N.Y. 1975) 398 F.Supp. 1057, 1059.) The California rule also assigns this question to the courts. (Code Civ.Proc., section 1281.2, subd. (a); also see, *Butchers Union v. Farmers Markets* (1977) 67 Cal.App.3d 905, 913, 136 Cal.Rptr. 894.)

The federal courts have held that where a party asserts arbitration in its answer as an affirmative defense, there is a heavy burden on the party seeking to establish waiver. (*Martin Marietta Aluminum, Inc. v. General Elec. Co.* (9th Cir. 1978) 586 F.2d 143, 146; *Hilti, Inc. v. Oldach* (1st Cir. 1968) 392 F.2d 368, 371.) Furthermore, "[c]ourts have specifically held that this factor alone is sufficient to defeat a claim of waiver. [Citations.]" (*Michael v. SS Thanasis* (N.D. Cal. 1970) 311 F.Supp. 170, 181.) Real parties' answers included such assertions with the exception of the one which they filed in the *Gouveia* case.

While federal law requires the courts to consider several factors in determining whether there has been a waiver of the right to demand arbitration, including the dilatory conduct of the party seeking arbitration and any other actions taken by the moving party which are inconsistent with seeking arbitration, a crucial inquiry is whether the conduct cited in support of this claim has resulted in prejudice to the party asserting waiver. If the element of prejudice is absent, waiver usually will not be found. (*Shinto Shipping Co. v. Fibrex & Shipping Co., Inc.* (9th Cir. 1978) 572 F.2d 1328, 1330; *Erving v. Virginia Squires Basketball Club* (2d Cir. 1972) 468 F.2d 1064, 1068; *Weight Watch. of Quebec Ltd. v. Weight W. Int., Inc., supra,* 398 F.Supp. 1057, 1059.) While "[s]ufficient prejudice to infer waiver might be found, for example, if the party seeking the stay *took advantage* of judicial discovery procedures not available in arbitration. [Citations.]" (*Carcich v. Rederi A/B Nordie* (2d Cir. 1968) 389 F.2d 692, 696, fn. 7, emphasis added.),

the condition which the trial court included in its order compelling arbitration would appear to have disspelled any prejudice which might have resulted from any inequality in discovery.

Moreover, it is not clear that real parties' conduct can be characterized as dilatory. They moved to compel arbitration approximately four months after the complaint was filed in the *Keating* case and, apparently, filed similar petitions in the individual cases within a month of the filing of amended complaints.[4] Not only did those amended complaints raise complex bookkeeping and accounting issues, but, as the trial judge noted, they were otherwise arbitrable.

Petitioners note that in the *Gouveia, Newell, Sampson* and *Keating* cases real parties either cross-complained or counterclaimed before seeking arbitration, and argue that by "irrevocably . . . [locking] litigious horns . . . [citation]," (*Hilti, Inc. v. Oldach, supra,* 392 F.2d 368, 371) waived their right to demand arbitration. In *Gouveia,* real parties also filed a separate action for a receivership and, in *Keating,* they attempted to remove the case to federal court and filed an unlawful detainer action for default under the franchise contract before seeking arbitration. While such conduct would appear to be inconsistent with an intent to seek arbitration, it does not amount to prejudice. "As an abstract exercise in logic it may appear that it is inconsistent for a party to participate in a lawsuit for breach of contract, and later to ask the court to stay that litigation pending arbitration. Yet the law is clear that such participation, standing alone, does not constitute a waiver, [citations], for there is an overriding federal policy favoring arbitration." (*Carcich v. Rederi A/B Nordie, supra,* 389 F.2d at p. 696.)

Petitioners rely upon *Barber & Ross Company v. Cornell & Company* (D.D.C. 1965) 242 F.Supp. 825, aff'd in (D.C.Cir. 1966) 360 F.2d 512, in which the court declined to order arbitration where the party seeking arbitration had filed a

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4 When the trial court heard the petitions in the individual cases, the parties stipulated that a similar petition be deemed to have been made in the *Buttersby* class action.

motion for a change in venue, an answer, and a counterclaim, and had begun taking a deposition before it made its request for arbitration. However, we are persuaded that the inclusion of arbitration as an affirmative defense in all but one of real parties' answers, and trial court's equalization of any disparity in discovery, and the amendment to petitioners' pleadings distinguish this case from *Barber.*

As we noted above, California law also requires us to conclude that the trial court did not err in rejecting petitioners' claim of waiver. Since arbitration is a favored means of settling disputes, "the courts have been admonished to 'closely scrutinize any allegation of waiver of such favored right' [citation] and to 'indulge every intendment to give effect to such proceedings' [citations]." (*Doers v. Golden Gate Bridge Etc. Dist.* (1979) 23 Cal.3d 180, 189, 151 Cal.Rptr. 837, 842, 588 P.2d 1261, 1266.) Nevertheless, the right to compel arbitration may be waived. "[¶] Waiver of a contractual right to arbitration is ordinarily a question of fact and determination of this question, if supported by substantial evidence, is binding on an appellate court. [Citation.]" (*Id.*, at p. 185, 151 Cal.Rptr. at p. 839, 588 P.2d at p. 1263.)

Our Supreme Court has recently indicated that there is no single test for determining whether the right to demand arbitration has been waived. (*Davis v. Blue Cross of Northern California* (1979) 25 Cal.3d 418, 426, 158 Cal.Rptr. 828, 600 P.2d 1060.) "California courts have found a waiver of the right to demand arbitration in a variety of contexts, ranging from situations in which the party seeking to compel arbitration has previously taken steps inconsistent with an intent to invoke arbitration [citations] to instances in which the petitioning party has unreasonably delayed in undertaking the procedure. [Citations.] The decisions likewise hold that the 'bad faith' or 'wilful misconduct' of a party may constitute a waiver and thus justify a refusal to compel arbitration. [Citation.]" (*Id.*, at pp. 425-426, 158 Cal.Rptr. at p. 832, 600 P.2d at p. 1064.) While the "mere filing of a lawsuit does not constitute a waiver of the right to arbitrate", the "judicial *litigation* of the merits of arbitrable issues . . . waives a party's right to arbitration."

(*Doers v. Golden Gate Bridge Etc. Dist., supra,* 23 Cal.3d 180, 183, 188, 151 Cal.Rptr. 837, 841, 588 P.2d 1261, 1265.) A party who includes arbitration as an affirmative defense in his answer may be able to avoid a finding of waiver. (Cf. *Butchers Union v. Farmers Markets, supra,* 67 Cal.App.3d 905, 913, 136 Cal.Rptr. 894.) Finally, while the concept of prejudice is not as significant as it is in federal law, it is relevant to the question of waiver. (*Doers v. Golden Gate Bridge Etc. Dist., supra,* 23 Cal.3d 180, 188, 151 Cal.Rptr. 837, 588 P.2d 1261.) A consideration of the facts which lead us to conclude that there was no waiver under federal law also leads us to conclude that there was substantial evidence to support the trial court's finding of no waiver under California law.

The facts which distinguish this case from *Barber* also distinguish it from *Gunderson v. Superior Court* (1975) 46 Cal.App.3d 138, 120 Cal.Rptr. 35, disapproved in *Doers v. Golden Gate Bridge Etc. Dist., supra,* 23 Cal.3d 180, 188, 151 Cal.Rptr. 837, 588 P.2d 1261. Similarly, we have concluded that petitioners' reliance upon *McConnell v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1980) 105 Cal.App.3d 946, 164 Cal.Rptr. 751 is misplaced. In addition to the factual discrepancies alluded to in the discussion of *Barber* and *Gunderson,* there were no pretrial proceedings in this case which could be analogized to the five "lengthy" hearings regarding class certification which were conducted in *McConnell* before arbitration was sought.

In light of our discussion, we find it unnecessary to address petitioners' argument that the trial court abused its discretion by relying upon the fact that the various cases had been coordinated in ordering arbitration.

III. *The trial court should have determined the class actions issues.*

In the *Keating* and *Battersby* cases, the named plaintiffs seek to represent some 800 persons who are California 7-Eleven franchisees who have entered into identical agreements with Southland Corporation during a four-year period. Petitioners contend that if arbitration is appropriate, the trial court should

be instructed to determine the preliminary issues regarding class certification before the cases are resolved on their merits. The issue presented appears to be one of first impression.

Our review of the record indicates that while petitioners argued this point in the context of real parties' petitions to compel arbitration, no motion to certify the class was made, and the trial court did not expressly rule on the matter. In *Phelan v. Superior Court* (1950) 35 Cal.2d 363, 372, 217 P.2d 951, 956 the Supreme Court wrote that "Before seeking mandate in an appellate court to compel action by a trial court, a party should first request the lower court to act. If such request has not been made the writ ordinarily will not issue unless it appears that the demand would have been futile. [Citations.]" However, while petitioners did not focus upon this issue by means of a specific motion, the question clearly was raised before the trial court. Furthermore, given that petitioners argued that arbitration should not be ordered until the preliminary class action questions were determined, the trial judge implicitly rejected petitioners' argument by ordering arbitration. Thus, making a more formal demand would have been futile.

It appears that no federal decision had dealt with this question; however, there is some authority which indicates that the class action and arbitration procedures could be joined in an appropriate case. Under Federal Rule of Civil Procedure 81(a)(3) which provides that the federal rules apply to proceedings under the Federal Arbitration Act to the extent that the act does not provide for procedural matters, the courts have held that consolidation of arbitrations is permissible pursuant to Federal Rule of Civil Procedure 42. (*Compania Espanola de Pet., S.A. v. Nereus Ship.* (2d Cir. 1975) 527 F.2d 966, 975, cert. den. 426 U.S. 936, 96 S.Ct. 2650, 49 L.Ed.2d 387; *Marine Trading Ltd. v. Ore Intern. Corp.* (S.D.N.Y. 1977) 432 F.Supp. 683, 684; *Robinson v. Warner* (D.R.I. 1974) 370 F.Supp. 828, 829-830.) Applying rule 23 of the Federal Rules of Civil Procedure to arbitration proceedings would appear to be a logical extension of the theory employed in the consolidation cases.

Real parties respond that Rule 81(a)(3) only applies to *judicial* proceedings, and, therefore, cannot serve as a means for applying rule 23 to arbitrations. (*Great Scott Supermkts., Inc. v. Local U. No. 337, Teamsters* (E.D. Mich., S.D. 1973) 363 F.Supp. 1351, 1354.) However, given the fact that issues such as those involved in the certification of the class would be dealt with by the court before the matter was sent to the arbitrator, petitioners appear to be correct in arguing that real parties' claim misses the mark. (Cf. *Robinson v. Warner, supra,* 370 F.Supp. 828, 830.)

Real parties also argue that imposing the class action format upon arbitrations would result in unnecessary interference by the courts in and undue delay of the arbitration process. The most forceful claim made in this regard concerns the requirement that the courts oversee the adequacy of representation by the named plaintiffs of the interests of absent class members. (*In re General Motors Corp. Engine Interchange Lit.* (7th Cir. 1979) 594 F.2d 1106, 1124, cert. den. 444 U.S. 870, 100 S.Ct. 146, 62 L.Ed.2d 95; *Guerine v. J. & W. Inv., Inc.* (5th Cir. 1977) 544 F.2d 863, 864; *Gonzales v. Cassidy* (5th Cir. 1973) 474 F.2d 67, 75.) In this connection, real parties also note that court approval must be obtained in order to dismiss or settle a class action. (Fed.R.Civ.P. 23(e).)

Turning to California law, the two California decisions which have considered the relationship between arbitration and the class action procedure do not appear to be dispositive. In *Frame v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1971) 20 Cal.App.3d 668, 672, 97 Cal.Rptr. 811, 818 the court rejected respondent's argument that arbitration should not be required because respondent had brought his action on behalf of the class of persons affected by the contract at issue. "But if all employees similarly situated have signed the same arbitration agreement as that which respondent challenges, all are equally bound. If the agreement is valid, it is valid as to all members of the class. It would be inappropriate to allow respondent and the other members of the class he claims to represent to evade the terms of the agreement simply by bringing their action together as a 'class' rather than as individuals."

In *Vernon v. Drexel Burnham & Co.* (1975) 52 Cal.App.3d 706, 125 Cal.Rptr. 147, the court reversed the trial court's denial of the defendant's petition to compel arbitration. The court concluded that the trial court had relied upon a faulty premise and held that "if VERNON did proceed alone to arbitration it would not mechanically render him unfit to represent a class or subclass of customers of DREXEL BURNHAM similarly situated. The determination whether or not VERNON can fairly and adequately protect that class rests in the sound discretion of the trial court [citation], although, of course, VERNON may be disqualified to act as a representative plaintiff to subclasses of customers of DREXEL BURNHAM, if any, where the arbitration clause is not a factor. [Citation.]" (52 Cal.App.3d at p. 715, fn. 4, 125 Cal.Rptr. at p. 152.) The court also held that "in the instant case, the policy of law favoring arbitration prevails over the policy of the law pertaining to class actions . . . ." (*Id.*, at p. 715, 125 Cal.Rptr. at p. 152.) The court reasoned that: (1) "arbitration is a recognized and favored means by which parties expeditiously and efficiently may settle disputes which might otherwise take years to resolve. [Citations.]"; (2) "[¶] . . . there is perhaps no higher public policy than to uphold and give effect to contracts validly entered into and legally permissible in subject matter . . . ."; and (3) "[¶] . . . the substantive law of contractual agreement takes precedence over the class action, which is merely a procedural device for consolidating matters properly before the court." (*Id.*, at pp. 715-716, 125 Cal.Rptr. at p. 153.)

Real parties argue that *Vernon* is controlling because, given the procedural context in which it was decided, the court rejected the very order which petitioners seek here—a postponement of the determination of the arbitration petition pending certification of the class. However, not only is it unclear that the trial court's order in *Vernon* amounted to a postponement of the determination of the arbitration petition pending *certification* of the class because such certification would require the resolution of other issues such as the adequacy of named representatives, but *Vernon* also appears to be

factually distinguishable in at least two important respects. First, as petitioners note, it was not clear that the case involved class-wide issues regarding arbitration because "neither VERNON nor DREXEL BURNHAM . . . [had] alleged or proved that the other purported members of the class represented by VERNON entered into or were subject to the same or similar agreements; . . ." (*Id.* at p. 711, 125 Cal.Rptr. at p. 150.) More importantly, it appears that the plaintiff in *Vernon* effectively argued that the existence of the class action vitiated his agreement to arbitrate, and the court specifically concluded that the trial court's order denying arbitration was based upon the incorrect premise discussed above. It should be noted that given this conclusion, the court's "holding" regarding what it perceived to be conflicting policy considerations was dicta.

Petitioners contend that since Code of Civil Procedure section 382 is silent on the question of class-wide arbitration, we should look to rule 23 of the Federal Rules of Civil Procedure for guidance. (*La Sala v. American Sav. & Loan Assn.* (1971) 5 Cal.3d 864, 872, 97 Cal.Rptr. 849, 489 P.2d 1113.) Real parties respond that the policy considerations discussed above concerning unnecessary judicial interference in and undue delay of arbitrations apply with equal force to California law. (*Sapp v. Barenfeld* (1949) 34 Cal.2d 515, 520, 212 P.2d 233; *East San Bernardino County Water Dist. v. City of San Bernardino* (1973) 33 Cal.App.3d 942, 949-950, 109 Cal.Rptr. 510; *McRae v. Superior Court* (1963) 221 Cal. App.2d 166, 171, 34 Cal.Rptr. 346.) They also argue that while consolidation is permissible in California, it cannot be equated with class-wide arbitration because the former procedure is of a limited nature and all parties are present. Real parties further note that in California Rule of Court 1600.5, subdivision (b), the Judicial Council exempted class actions from compulsory judicial arbitration, and argue that this action indicated that the Council was of the opinion that class actions were not amenable to arbitration.

We have concluded that there is no insurmountable obstacle to conducting an arbitration on a class-wide basis. In an

appropriate case, such a procedure undoubtedly would be the fairest and most efficient way of resolving the parties' dispute. The initial determinations regarding certification and notice will not unduly burden the arbitration because those matters must be resolved by the trial court before arbitration begins.

We wish to stress that we have formed no opinion upon the question of whether this case should proceed as a class action. However, if the trial court answers this question affirmatively, it will be necessary to devise methods to safeguard the rights of absent class members to adequate representation and in the event of dismissal or settlement. Since these matters may be purely academic and have not been thoroughly explored by the parties here, we shall leave their determination to the trial court.

Let the peremptory writ of mandate issue directing the trial court to determine the preliminary class action issues, including the suitability of the action as a class suit, the composition of the class, and the appropriate notice procedure, in accordance with the guidelines established in Federal Rule of Civil Procedure 23. Insofar as the petition seeks a writ to compel the trial court to set aside its order compelling arbitration, it is denied.

Each side is to bear its own costs for proceedings on the writ petition.

GARZA, ET AL. v. THE SOUTHLAND CORPORATION, ET AL.

The Southland Corporation and various employees and former employees have appealed from the trial court's denial of their petitions to compel arbitration concerning certain claims made against them pursuant to the Franchise Investment Law. (Corp. Code, § 31000 et seq.)

The claims which respondents cite as being typical of those at issue here relate to appellants' failure to disclose information at least 48 hours prior to the execution of the franchise agreements and certain wilful misrepresentations and omissions in the disclosure statements which appellants did make. The parties agree that although the trial judge relied primarily

upon his interpretation of the contractual arbitration provisions as being too narrow to include respondents' claims, he also believed that the Legislature did not intend that claims pursuant to the Franchise Investment Law should be subject to arbitration.

1. *The arbitration clauses, by their terms, require arbitration of these claims.*

The arbitration clauses state, in pertinent part: "*any controversy or claim arising out of or relating to* this Agreement or the breach hereof shall be settled by arbitration in accordance with the Rules of the American Arbitration Association . . . ." (Emphasis added.) Looking to the language of the clauses as a principal source from which to derive the contracting parties' intent (*Healy Tibbets Construction Co. v. Employers' Surplus Lines Ins. Co.* (1977) 72 Cal.App.3d 741, 748, 140 Cal.Rptr. 375; Cal.Civ.Code, § 1638), the language emphasized above is broad enough to cover respondents' claims under the Franchise Investment Law.

Respondents' arguments to the contrary are untenable. Not only would it be unreasonable to require that an arbitration clause specify the legal basis for a claim in order for the clause to apply (*Weinrott v. Carp* (1973) 32 N.Y.2d 190, 344 N.Y.S.2d 848, 853-854, 298 N.E.2d 42), but it would also be unreasonable to assume that the violations at issue did not "arise out of" or "relate to" the franchise agreements, especially in light of the expressed legislative intent of the Franchise Investment Law.[5]

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5 Corporations Code section 31001 provides in pertinent part:

> It is the intent of this law to provide each prospective franchisee with the information necessary to make an intelligent decision regarding franchises being offered. Further, it is the intent of this law to prohibit the sale of franchises where such sale would lead to fraud or a likelihood that the franchisor's promises would not be fulfilled, and to protect the franchisor by providing a better understanding of the relationship between the franchisor and franchisee with regard to their business relationship.

Appellants rely upon various cases in which the courts have held that arbitration clauses which were similar to the ones at issue were broad enough to encompass tort as well as contract claims. (*Berman v. Dean Witter & Co., Inc.* (1975) 44 Cal.App.3d 999, 1003, 119 Cal.Rptr. 130; *Lewsadder v. Mitchum, Jones & Templeton, Inc.* (1973) 36 Cal.App.3d 255, 259, 111 Cal.Rptr. 405; *Acevedo Maldonado v. PPG Industries, Inc.* (1st Cir. 1975) 514 F.2d 614, 616.) While respondents may be correct in asserting that the torts at issue in these cases had occurred after the execution of the contracts, their attempt to distinguish this case is artificial. Although the "roots" of respondents' claims may be in the Franchise Investment Law, in a technical sense, their source is the creation of the franchise relationship. Furthermore, as appellants note, the United States Supreme Court has held that an arbitration clause such as the one at issue may extend to a claim that the creation of the contract was induced by fraud. (*Prima Paint Corp. v. Flood & Conklin Mfg. Co.* (1967) 388 U.S. 395, 403-404, 87 S.Ct. 1801, 1805-1806, 18 L.Ed.2d 1270.)

II. *Corporations Code section 31512 does not operate to invalidate contractual provisions insofar as they require that claims under the Franchise Investment Law be submitted to arbitration, and, even if it did, the statute would be superseded by federal law.*

Appellants contend that the Legislature did not intend Corporations Code section 31512 to be interpreted according to the doctrine established by the Supreme Court in *Wilko v. Swan* (1953) 346 U.S. 427, 74 S.Ct. 182, 98 L.Ed. 168.[6] They claim that the statute was designed to invalidate contractual provisions purporting to require that a franchisee surrender a right under the Franchise Investment Law and that the arbitration clause at issue does not come within that proscription.

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6 Corporations Code section 31512 provides:

> Any condition, stipulation or provision purporting to bind any person acquiring any franchise to waive compliance with any provision of this law or any rule or order hereunder is void.

"In proceeding with the task of interpretation . . . we are aided by certain general principles of statutory construction. As stated by this court in *Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222 . . ., at page 230 [110 Cal.Rptr. 144, 514 P.2d 1224]: 'We begin with the fundamental rule that a court "should ascertain the intent of the Legislature so as to effectuate the purpose of the law." [Citation.] In determining such intent "[t]he court turns first to the words themselves for the answer." [Citation.] We are required to give effect to statutes "according to the usual, ordinary import of the language employed in framing them." [Citations.]' " (*Palos Verdes Faculty Assn. v. Palos Verdes Peninsula Unified Sch. Dist.* (1978) 21 Cal.3d 650, 658-659, 147 Cal.Rptr. 359, 363, 580 P.2d 1155, 1159.) Applying these principles to section 31512, we agree that the Legislature does not appear to have intended that the section preclude arbitration of all claims brought under the Franchise Investment Law.

However, as appellants concede, to the extent that the statutory language can be argued to be ambiguous, another rule of statutory construction is relevant. That rule has been expressed by our Supreme Court as follows: "This court has long recognized the principle of statutory construction that '[w]hen legislation has been judicially construed and a subsequent statute on the same or an analogous subject is framed in the identical language, it will ordinarily be presumed that the Legislature intended that the language as used in the later enactment would be given a like interpretation. This rule is applicable to state statutes which are patterned after federal statutes. [Citations.]' [Citations.]" (*Belridge Farms v. Agricultural Labor Relations Bd.* (1978) 21 Cal.3d 551, 557, 147 Cal.Rptr. 165, 169, 580 P.2d 665, 669.)

In *Wilko v. Swan, supra,* 346 U.S. 427, 74 S.Ct. 182, 98 L.Ed. 168, the arbitration agreement at issue was subject to the provisions of the Federal Arbitration Act. The court concluded that "The words of § 14 . . . void any 'Stipulation' waiving compliance with any 'provision' of the Securities Act [of 1933]. This arrangement to arbitrate is a 'stipulation,' and we think the right to select the judicial forum is the kind of

'provision' that cannot be waived under § 14 of the Securities Act."[7] (346 U.S. at pp. 434-435, 74 S.Ct. at p. 186.)

Although the language of the two statutes is parallel and the statutory schemes containing them may have shared similar policy concerns, respondents have cited no authority which indicates that section 31512 was patterned after section 14. Moreover, unlike *Wilko,* which involved competing federal statutes, this case presents a conflict between a federal statute and a state statute. (*Allison v. Medicab Intern., Inc.* (1979), 92 Wash.2d 199, 597 P.2d 380, 382.)

Appellants argue that if section 31512 were interpreted according to the doctrine of *Wilko v. Swan,* the statute would conflict with the Federal Arbitration Act and would be void pursuant to the Supremacy Clause. (U.S.Const., Art. III, § 2.) We agree. If the doctrine were applied, section 31512 would conflict with the language in section 2 of the Federal Arbitration Act which makes provisions to arbitrate in contracts pertaining to transactions in interstate commerce "valid, irrevocable, and enforceable." Furthermore, the application of the rule in *Wilko v. Swan* does not fit within the exception in section 2 for "such grounds as exist at law or in equity for the revocation of any contract" because that exception appears to be directed toward tenets of general contract law.

In *Allison v. Medicab Intern., Inc., supra,* 597 P.2d 380, plaintiffs and defendants had entered into a franchise agreement for the transportation of the physically handicapped which contained an arbitration clause. Plaintiffs brought an action which included alleged violations of Washington's Franchise Investment Protection Act. Defendants' demand for arbitration was denied. On appeal, plaintiffs contended that "because the statute gives jurisdiction of such matters to state courts (RCW 19.100.-160), the arbitration clause does not

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7 Section 14 of the Securities Act provides:

"Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void." (15 U.S.C., § 77n.)

apply." (*Id.*, at p. 381.) The Supreme Court of Washington reversed. Having concluded the Federal Arbitration Act was controlling, the court said "[t]he majority rule . . . appears to be that the act does apply and requires a state court to enforce an arbitration clause despite a contrary state law or policy. [Citations.]" (*Id.*, at p. 382.) Applying this rule, the court rejected the claim that defendants' failure to register pursuant to the Franchise Investment Protection Act vitiated the arbitration clause. While the court did not specifically refer to the anti-waiver provision in the Franchise Investment Protection Act (RCW 19.100.220), the court distinguished *Wilko v. Swan* as follows: ". . . this case involved two federal acts and not as here the federal arbitration act and a state franchising act. [Citation.]" (*Id.*, at p. 382.)

In the recent case of *Barron v. Tastee Freeze Intern., Inc.*, (E.D.Wis. 1980) 482 F.Supp. 1213, the court denied the plaintiffs' motion to permanently enjoin a pending arbitration. Plaintiffs' claims included violations of the Wisconsin and Illinois franchise investment acts. In rejecting an argument analogous to the one which respondents make here, the court said that "Except in a few areas of law, however, notably the Federal Securities Act of 1933 and the federal antitrust statutes [citations], federal policy strongly favors the enforcement of arbitration clauses under Title 9 U.S.C." (*Id.*, at p. 1216; see *Romnes v. Bache & Co., Incorporated* (W.D.Wis. 1977) 439 F.Supp. 833.) The court concluded that: ". . . the effect of my holding with respect to this argument of the plaintiffs is to render void any effort made by a state to protect the remedies of franchise investors whose arguments encompass transactions in interstate commerce, even when the contracting parties are both residents of the state which passes the protective laws, see *Allison v. Medicab International, Inc.* 92 Wash.2d 199, 597 P.2d 380, 383 (1979), but that result is compelled by the language of 9 U.S.C. § 2 and by the authority of Congress under the Interstate Commerce and Supremacy Clauses of the United States Constitution to regulate interstate commercial transactions in the manner it sees fit and to

preempt state regulatory efforts which conflict with the federal scheme. (482 F.Supp. at p. 1217.)

Respondents' reliance upon *American Airlines, Inc. v. Louisville & Jefferson C.A.B.* (6th Cir. 1959) 269 F.2d 811 is misplaced. Not only did the court take a restrictive view of the scope of the Federal Arbitration Act (id., at pp. 816-817), but the argument made against enforcing the contract concerning the capacity of one of the parties appears to fit within the exception in section 2 of the Federal Arbitration Act for "such grounds as exist at law or in equity for the revocation of any contract."

The judgment is reversed and the trial court is directed to enter its order granting arbitration. Appellants are to receive costs on this appeal.

WHITE, P. J., and SCOTT, J., concur.

APPENDIX C

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

JUDICIAL COUNCIL COORDINATION PROCEEDING NO. 387

Napa Superior Court No. 37402

COORDINATION PROCEEDING SPECIAL TITLE (Rule 1550(b))

MARKET FRANCHISE CASES

Included action:

Keating v. Southland

ORDER RE PETITION FOR ORDER TO ARBITRATE
[Filed February 16, 1978]

The Petition of defendant The Southland Corporation for Order to Arbitrate filed in the action entitled "Richard D. Keating, et al. vs. The Southland Corporation, et al., Napa County Superior Court, No. 37402," having come on for hearing the 30th day of January, 1978, before the Honorable Robert H. Kroninger, Judge of the Superior Court and Coordination Trial Judge, with Mark J. Spooner, Esq., of Arnold & Porter, and Charles G. Miller, Esq., of McKenna & Fitting, appearing on behalf of defendant The Southland Corporation, and John F. Wells, Esq., of Stark, Stewart, Simon & Sparrowe, Robert M. Brown, Esq., and John F. Banker, Esq., appearing on behalf of plaintiffs and respondents Richard D. Keating and Darla J. Keating, and the Court having considered the argument of counsel and all of the papers, memoranda, and briefs filed by the parties, and good cause appearing therefor;

IT IS HEREBY ORDERED that the Petition for Order to Arbitrate, originally filed on September 28, 1977, be, and the same hereby is, GRANTED, with the exception of the subject matter embracing line 19, page 5, through and including the sentence ending on line 1, page 6 of said petition.

IT IS HEREBY FURTHER ORDERED that further proceedings herein as to the *Keating* v. *Southland* action referred to above be, and the same hereby are, STAYED pending the outcome of such arbitration or until further order of this Court.

Presented and signed in open court this 16 day of February, 1978.

/S/ ROBERT H. KRONINGER
Judge of the Superior Court

APPENDIX D

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

Judicial Council Coordination Proceeding No. 387

Napa Superior Court No. 37276

Santa Clara Superior Court No. 390132

Alameda Superior Court No. 469216-2, No. 505160-5, No. 505161-4, No. 505159-9, No. 505162-3, No. 505164-1

Added-On Cases

Alameda Superior Court No. 501580, No. 473115

Coordination Proceeding Special Title (Rule 1550(b))

MARKET FRANCHISE CASES

ORDER RE MOTIONS HEARD ON APRIL 26, 1978
[Filed May 5, 1978]

On April 26, 1978, the Petitions of Defendant The Southland Corporation for Order to Arbitrate Disputes and Motion for Stay of Proceedings Pending Arbitration in *Gouveia* v. *Southland* (No. 469216-2), *Garza* v. *Southland* (No. 505160-5), *Sampson* v. *Southland* (No. 505161-4) *Cheng* v. *Southland* (No. 505162-3) and *Newell* v. *Southland* (No. 505164-1) came on for hearing before the Honorable Robert H. Kroninger, Judge of the Superior Court and Coordination Trial Judge. The parties have stipulated that the same Petition and Motion shall be deemed to have been made in *Battersby* v. *The Southland Corporation* (No. 390132) and the Court may rule thereon at this time. Mark J. Spooner, Esq. of Arnold & Porter, and Charles G. Miller, Esq. and Martin H. Kresse, Esq. of McKenna & Fitting appeared on behalf of petitioner and

defendant The Southland Corporation, and John F. Wells, Esq. of Stark, Stewart, Simon & Sparrowe, Linda R. Joseph, of the Law Offices of Robert M. Brown, and John F. Banker, Esq. of Banker & Linderman, appeared on behalf of the plaintiffs and respondents in those actions.

The court having considered the arguments of counsel and all the papers, memoranda and briefs filed by the parties, and good cause appearing therefor,

IT IS HEREBY ORDERED that the petitions for order to arbitrate and motion for stay of proceedings in the above referenced cases be, and the same hereby are, GRANTED, with the exception of the claims based upon the California Franchise Investment Law, which claims are contained in the First Cause of Action of the Second Amended Complaints in the *Garza* and *Sampson* cases, and the First Cause of Action in the First Amended Complaint in the *Gouveia, Cheng* and *Newell* cases and the Second Cause of Action of the Complaint in the *Battersby* case. To the extent that this order grants Southland's petitions for order to compel arbitration, said petitions are granted on the condition that Southland either abstain from the use of any discovery that it has had in any of the above actions, or that Southland stipulate to discovery of at least an equally extensive nature on behalf of the plaintiffs in those actions.

IT IS HEREBY FURTHER ORDERED that further proceedings in the *Gouveia, Garza, Sampson, Cheng, Newell,* and *Battersby* cases, referred to above, be, and the same hereby are, stayed pending the outcome of such arbitration or until further order of this Court.

The plaintiffs in *Keating* v. *Southland* (No. 505159-9) have moved to lift the stay previously issued in that case for purposes of discovery; Southland has filed a notice of appeal from this Court's order denying its petition to compel arbitration of the Franchise Investment Law claims in *Keating* v. *Southland*; the parties have agreed that because of the appeal this Court probably lacks jurisdiction to rule on said motion, and said motion was withdrawn.

Plaintiffs in *Garza* v. *Southland* (No. 505160-5) have also moved for an order to set a discovery schedule and trial date in that case. The court having considered said motion, and having made its rulings with respect to arbitration above, IT IS HEREBY ORDERED that said motion be, and the same hereby is DENIED.

The Southland Corporation has filed a demurrer to answer, or, in the alternative, a motion to strike affirmative defenses in *Southland* v. *Battersby* (No. 501580-5). The Court having considered the matter, and the arguments of counsel, and good cause appearing therefor,

IT IS HEREBY ORDERED that the demurrer be, and the same hereby is, SUSTAINED, and the motion to strike be, and the same hereby is, GRANTED, as to the following portions of the Answer to First Amended Complaint: 1) page 2, line 15 through and including page 3, line 18, save and except for the last sentence in paragraph 5 at page 3 thereof; and 2) the First Affirmative defense. In all other respects the demurrer is overruled.

Defendant The Southland Corporation and certain other defendants have also filed demurrers to the Second Amended Complaints in the *Garza* and *Sampson* cases and to the First Amended Complaints in the *Gouveia, Cheng* and *Newell* cases. The court having considered these matters, and the arguments of counsel, and good cause appearing,

IT IS HEREBY ORDERED that the demurrers be, and the same hereby are, OVERRULED, and Southland and the demurring individual defendants shall have up to and including 30 days from the date of this Order in which to file answers to the complaints which were the subject of the demurrers, notice of said ruling having been waived.

Signed this 5th day of May, 1978, in open court.

/S/ ROBERT H. KRONINGER
Judge of the Superior Court and
Coordination Trial Judge

APPENDIX E

IN THE SUPERIOR COURT OF
THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

Judicial Council Coordination Proceeding No. 387

Napa Superior Court No. 37402 now Alameda Superior Court No. 505159-9, No. 37276 now Alameda Superior Court No. 507470-3

Santa Clara Superior Court No. 35613 now Alameda Superior Court No. 505160-5, No. 361187 now Alameda Superior Court No. 505161-4, No. 364650 now Alameda Superior Court No. 505162-3, No. 366559 now Alameda Superior Court No. 505164-1, No. 390132

Alameda Superior Court No. 469216-2, No. 473115-3, No. 501580-5, No. 506120-6

Los Angeles Superior Court No. C 234510, No. C 235779

Coordination Proceeding Special Title (Rule 1550(b))

MARKET FRANCHISE CASES

Relating to: *Garza v. Southland*, Alameda Superior Ct. No. 505160-5; *Cheng v. Southland*, Alameda Superior Ct. No. 505162-3; *Newell v. Southland*, Alameda Superior Ct. No. 505164-1; *Sampson v. Southland*, Alameda Superior Ct. No. 505161-4; *Gouveia v. Southland*, Alameda Superior Ct. No. 469216-2; *Keating v. Southland*, Alameda Superior Ct. No. 505159-9; *Coy v. Southland*, Alameda Superior Ct. No. 506120-6; *Battersby v. Southland*, Santa Clara Superior Ct. No. 390132; *Southland v. Scovis*, Los Angeles Superior Ct. No. C-235779

ORDER RE MOTIONS HEARD ON JULY 19, 1978
[Filed July 31, 1978]

On July 19, 1978, various motions came on for hearing before this honorable Court in the above captioned coordinated actions. Mark J. Spooner, Esq., of Arnold & Porter, and Charles G. Miller, Esq., of McKenna & Fitting appeared on behalf of The Southland Corporation and the individual defendants and John F. Wells, Esq. and D. Barratt Irwin, Attorney at Law, of Stark, Stewart, Simon & Sparrowe, and Linda R. Joseph, of the Law Offices of Robert M. Brown, appeared on behalf of plaintiffs (except in the *Scovis* case, where they appeared for cross-complainants).

1. Petitions for Orders to Arbitrate and Motions for Stay of Proceedings Pending Arbitration were filed by the persons listed below in the below captioned coordinated actions:

Gouveia v. Southland (Second Amended Complaint), No. 469216-2 Ernest Arzabal, Michael Drury and Ray Berry

Garza v. Southland (Second Amended Complaint), No. 505160-5 Gene Janssen, Michael Wildman, Ray Berry and Robert Johnson

Sampson v. Southland (Second Amended Complaint), No. 505161-4 Ray Berry and Dave Pava

Newell v. Southland (First Amended Complaint), No. 505164-1 Fred Elwood, Joseph Galea, Michael Wildman and Ray Berry

Cheng v. Southland (First Amended Complaint), No. 505162-3 Gene Janssen, Curtis Pare, Ray Berry and Paul Stevenson

Keating v. Southland (First Amended Complaint), No. 505159-9 Ray D. Berry, Keith Jenkins and Robert Duncan

Battersby v. Southland, No. 390132 Ray Berry

Coy v. Southland (Second Amended Complaint), No. 506120-6 Ray Berry, Tal Colson and The Southland Corporation

Southland v. Scovis (Cross-Complaint), L.A.S.C. No. C235779 Ray D. Berry, Douglas Porter and The Southland Corporation

The Court having considered the arguments of counsel and all the papers, memoranda and briefs filed by the parties, and good cause appearing therefor,

IT IS HEREBY ORDERED that the petitions for order to arbitrate and motion for stay of proceedings in the *Gouveia, Garza, Sampson, Newell, Cheng, Keating* and *Battersby* cases be, and the same hereby are, GRANTED, with the exception of the claims based upon the California Franchise Investment Law, which claims are contained in the First Cause of Action of the Second Amended Complaint in the *Gouveia, Garza* and *Sampson* cases, and the First Cause of Action in the First Amended Complaint in the *Cheng* and *Newell* cases and the Second Cause of Action of the Complaint in the *Battersby* case, and the Second Cause of Action in the First Amended Complaint in the *Keating* case. To the extent that this order grants the petitions for order to compel arbitration, said petitions are granted on the condition that petitioners either abstain from the use of any discovery that they have had in any of the above actions, or that they stipulate to discovery of at least an equally extensive nature on behalf of the plaintiffs in those actions.

IT IS HEREBY FURTHER ORDERED that the petition for order to arbitrate and motion for stay of proceedings in the *Coy* and *Scovis* cases, because said actions are based upon claims under the California Franchise Investment Law, be, and the same hereby are, DENIED.

IT IS HEREBY FURTHER ORDERED that further proceedings as to petitioners in the *Gouveia, Garza, Sampson, Cheng, Newell, Keating* and *Battersby* cases, referred to above, be, and the same hereby are, stayed therein pending the outcome of such arbitration or until further order of this Court.

2. Southland and the individual defendants listed above in the above captioned coordinated actions have also filed demurrers to the Second Amended Complaints in the *Gouveia, Garza, Sampson* and *Coy* cases, and to the First Amended Complaints in the *Cheng, Newell* and *Keating* cases and to the Complaint in the *Battersby* case and to the Cross-Complaint in the *Scovis* case. The Court having considered these matters, and good c[illegible] appearing therefor,

IT IS HEREBY ORDERED that the demurrers be, and the same hereby are, OVERRULED, and Southland and the demurring individual defendants shall have up to and including 30 days from the date of this Order in which to file answers to the complaints as to those causes of action not ordered arbitrated which were the subject of the demurrers, notice of said ruling having been waived.

3. Defendants John P. Thompson, Jere W. Thompson, Walton Grayson, III, Joseph S. Hardin, R. G. Smith, Eugene Pender, S. R. Dole and Terry Debard in all of the above captioned cases (with the exception of S. R. Dole in the *Keating* and *Battersby* cases) moved for an order quashing service of summons on each of them. The Court having considered said motions, the arguments of counsel, and good cause appearing therefor,

IT IS HEREBY ORDERED that said motions be, and the same hereby are, DENIED.

4. The Southland Corporation has moved for an order to dismiss the Complaint without prejudice in *Southland* v. *Scovis*. Defendants Mr. and Mrs. Scovis objected to said dismissal and Southland withdrew said motion at the hearing.

Signed this 31st day of July 1978, in open court.

/S/ ROBERT H. KRONINGER
Judge of the Superior Court
and Coordination Trial Judge

APPENDIX F

SUPREME COURT OF THE STATE OF CALIFORNIA

S. F. No. 24242

Appeal

County of Alameda

Superior Court No. 469216-2

RICHARD D. KEATING et al.,

Petitioners

—v.—

SUPERIOR COURT, ALAMEDA COUNTY,

Respondent;

SOUTHLAND CORPORATION et al.,

EDWARD J. GOUVEIA et al.,

Plaintiffs and Respondents,

—v.—

SOUTHLAND CORPORATION et al.,

Defendants and Appellants.

[And 7 other cases*]

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* *Cheng v. Southland Corporation* (Super. Ct. No. 505162-3); *Newell v. Southland Corporation* (Super. Ct. No. 505164-1); *Sampson v. Southland Corporation* (Super. Ct. No. 505161-4); *Battersby v. Southland Corporation* (Super. Ct. No. 390132); *Keating v. Southland Corporation* (Super. Ct. No. 505159-9); *Coy v. Southland Corporation* (Super. Ct. No. 506120-6); and *Scovis v. Southland Corporation* (Super. Ct. No. C-235779).

The above-entitled cause having been heretofore fully argued, and submitted,

IT IS ORDERED, ADJUDGED, AND DECREED by the Court that the order of the Superior Court of the County of Alameda in the above-entitled cause, is hereby reversed and the cause is remanded for further proceedings consistent with the opinion herein. In light of our opinion, the petition for writ of prohibition or mandate is denied. Each party to bear their own costs.

I, LAURENCE P. GILL, Clerk of the Supreme Court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above-entitled cause on the 10th day of June, 1982.

WITNESS my hand and the seal of the Court, this 20th day of July, 1982

LAURENCE P. GILL
Clerk

By _____
Deputy

[SEAL]

APPENDIX G

IN THE SUPREME COURT OF
THE STATE OF CALIFORNIA

S.F. No. 24242

RICHARD D. KEATING, *et al.*,
Petitioners,

—v.—

THE SUPERIOR COURT OF ALAMEDA COUNTY,
Respondent.

THE SOUTHLAND CORPORATION, *et al.*,
Real Parties in Interest.

EDWARD J. GOUVEIA, *et al.*,
Plaintiffs and Respondents,

—v.—

THE SOUTHLAND CORPORATION, *et al.*,
Defendants and Appellants.

[And 7 Other Cases]*

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES
[Filed August 24, 1982]

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* *Cheng v. Southland Corporation* (Super. Ct. No. 505162-3); *Newell v. Southland Corporation* (Super. Ct. No. 505164-1); *Sampson v. Southland Corporation* (Super. Ct. No. 505161-4); *Battersby v. Southland Corporation* (Super. Ct. No. 390132); *Keating v. Southland Corporation* (Super. Ct. No. 505159-9); *Coy v. Southland Corporation* (Super. Ct. No. 506120-6); and *Scovis v. Southland Corporation* (Super. Ct. No. C-235779).

Notice is hereby given that The Southland Corporation, and those of its officers, directors and employees who were named as defendants in the court below, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of California, entered in this action on June 10, 1982, insofar as that judgment held that certain claims in this litigation were not subject to arbitration, and insofar as it held that plaintiffs could seek to have their arbitrable claims certified as a class action.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Respectfully submitted,

ARNOLD & PORTER

/S/ MARK J. SPOONER
Peter K. Bleakley
Mark J. Spooner
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/S/ CHARLES G. MILLER
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220 Bush Street
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(415) 433-0640

Attorneys for Defendants and Real Parties in Interest, The Southland Corporation, *et al.*

Dated: August 24, 1982

[Certificate of service omitted]

APPENDIX H

SUPREME COURT OF THE UNITED STATES

No. A-213

THE SOUTHLAND CORPORATION, ET AL.,

Petitioners/Appellants
(or Applicants)

—v.—

RICHARD D. KEATING, ET AL.

ORDER

UPON CONSIDERATION of the application of counsel for the petitioners/appellants (applicants),

IT IS ORDERED that the time for filing a petition for writ of certiorari and/or docketing an appeal in the above-entitled cause, be, and the same is hereby, extended to and including September 22, 1982.

/S/ WILLIAM H. REHNQUIST
Associate Justice of the Supreme
Court of the United States

Dated this 30th day of August, 1982.

APPENDIX 1

Constitutional and Statutory Provisions Involved

1. The Supremacy Clause, U.S. CONST. art. VI, cl. 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

2. The Due Process Clause, U.S. CONST. amend. XIV, § 1

[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . .

3. The Federal Arbitration Act, 9 U.S.C. §§ 1-3 (1976)

§ 1. "Maritime transactions" and "Commerce" defined; exceptions to operation of title

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

§ 3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

4. The California Investment Franchise Law, Cal. Corp. Code § 31512 (West 1977)

Any condition, stipulation or provision purporting to bind any person acquiring any franchise to waive compliance with any provision of this law or any rule or order hereunder is void.